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FOR DISCUSSION ONLY

# **REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR  
SANTA FE, NEW MEXICO  
JULY 9 - JULY 16, 2009

# **REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT**

*WITH PREFATORY NOTE AND COMMENTS*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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June 3, 2009

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# **REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT**

## **Prefatory Note**

### **The 1946 Model State Administrative Procedure Act**

The Model State Administrative Procedure Act (Act) of the National Conference of Commissioners on Uniform State Laws (Conference) has furnished guidance to the states since 1946, the date that the first version of the Act was promulgated and published. The Federal Administrative Procedure Act was drafted at about the same time as the 1946 Act, and there was substantial communication between the drafters of the two acts.

The 1946 Act incorporated basic principles with only enough elaboration of detail to support essential features<sup>1</sup> of an administrative procedure act. This is the major characteristic of a “model”, as distinguished from a “uniform”, act. The drafters of the 1946 Act explained that a model act approach was required because details of administrative procedure must vary from state to state as a result of different general histories, different histories of legislative enactment and different state constitutions. Furthermore, the drafters explained, the Act could only articulate general principles because 1) agencies – even within a single state – perform widely diverse tasks, so that no single detailed procedure is adequate for all their needs; and 2) the legislatures of different states have taken dissimilar approaches to virtually identical problems.<sup>2</sup> By about 1960, twelve states had adopted the 1946 Act.<sup>3</sup>

### **The 1961 Model State Administrative Procedure Act**

As a result of several studies conducted in the nineteen fifties, the Conference decided to revise the 1946 Act. The basis given for that decision was that a maturing of thought on administrative procedure had occurred since 1946. The drafters of the 1961 Act explained that their goals were fairness to the parties involved and creation of procedure that is effective from the standpoint of government.<sup>4</sup> The resulting 1961 Act also followed the model, not uniform, act approach, because “details must vary from state to state.” The 1961 APA purposely included only “basic principles” and “essential major features.” Some of those major principles were: requiring agency rulemaking for procedural rules; rulemaking procedure that provided for notice, public input and publication; judicial review of rules; guarantees of fundamental fairness in adjudications; and provision for judicial review of agency adjudication. Over one half of the states adopted the 1961 Act or large parts of it.<sup>5</sup>

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<sup>1</sup> 1946 Model State Administrative Procedure Act preface at 200.

<sup>2</sup> Id. at 200

<sup>3</sup> Those states, as identified in the preface to the 1961 Model State Administrative Procedure Act were: North Dakota, Wisconsin, North Carolina, Ohio, Virginia, California, Illinois, Pennsylvania, Missouri, Indiana.

<sup>4</sup> Preface to 1961 Model State Administrative Procedure Act.

<sup>5</sup> Uniform Laws Annotated at 357 (1980 Master Edition) catalogued numerous states that used the 1961 Model State Administrative Procedure Act. They are: Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia,

## **The 1981 Model State Administrative Procedure Act**

In the nineteen seventies, the Conference began work on another revision of the Act which was completed in 1981. The Conference based the need for this revision upon greater experience with administrative procedure by state governments, and growth in state government in such areas as the environment, workplace safety and benefit programs. This growth, it was argued, was so great as to effect a change in the nature of state government. The 1981 Act sought to deal with those changes.

The preface to the 1981 Act explained that the approach to drafting had changed from the 1946 and 1961 Acts. According to the drafters, the 1981 Act was entirely new, with more detail than earlier versions of the Act. This expanded focus on detail was based upon changed circumstances in the states and greater state experience with administrative procedure since 1961.<sup>6</sup> The 1981 Act, when completed, consisted of ninety-four sections<sup>7</sup>. In the twenty-odd years since promulgation of the 1981 Act, Arizona, New Hampshire, and Washington have adopted many of its provisions. Several other states have drawn some of their administrative procedure provisions from the 1981 Act.<sup>8</sup>

## **The Present Revision**

There are several reasons for revision of the 1981 Act. It has been more than twenty-seven years since the Act was last revised. There now exists a substantial body of legislative action, judicial opinion and academic commentary that explain, interpret and critique the 1961 and 1981 Acts and the Federal Administrative Procedure Act. In the past two decades state legislatures, dissatisfied with agency rulemaking and adjudication, have enacted statutes that modify administrative adjudication and rulemaking procedure. The American Bar Association has recently undertaken a major study of the Federal Administrative Procedure Act and has recommended revision of some provisions of that act. Since some sections of the Model State Administrative Procedure Act are similar to the Federal Act, the ABA study furnishes useful

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Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>6</sup> Preface, 1981 Model State Administrative Procedure Act. The greater emphasis on detail in the 1981 Model State Administrative Procedure Act is apparent from the text of the preface:

In addition, the drafters of this effort have produced an act that is more detailed than the earlier Model Act. There are several reasons for this. First, virtually all state administrative procedure acts are much more detailed than the 1961 Revised Model Act. Second, the states badly need and want guidance on this subject in more detail than the earlier act provided. Third, substantial experience under the acts of the several states suggests that much more detail than is provided in the earlier Model Act is in fact necessary and workable in light of current conditions of state government and society. Since this is a Model Act and not a Uniform Act, greater detail in this act should also be more acceptable because each state is only encouraged to adopt as much of the act as is helpful in its particular circumstances.

<sup>7</sup> For example, the 1961 Model State Administrative Procedure Act contained nineteen sections; the 1981 Model State Administrative Procedure Act contained more than eighty sections divided among five different articles.

<sup>8</sup> Some of those states are: Florida, Iowa, Kansas, California, Mississippi and Montana.

comparisons for the Act. The emergence of the Internet, which did not exist at the time of the last revision of the Act, is another event that the Model Administrative Procedure Act must address. Finally, since the 1981 Act, approximately thirty states have adopted central panel administrative law judge provisions. What has been learned from the experience in those states can be used to improve this Act.



1                   **REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT**

2                                   **[ARTICLE] 1**

3                                   **GENERAL PROVISIONS**

4                   **SECTION 101. SHORT TITLE.** This [act] may be cited as the [state] Administrative  
5 Procedure Act.

6                   **SECTION 102. DEFINITIONS.** In this [act]:

7                   (1) “Adjudication” means the process for determining facts or applying law pursuant to  
8 which an agency formulates and issues an order.

9                   (2) “Agency” means a state board, authority, commission, institution, department,  
10 division, office, officer, or other state entity that is authorized or required by law of this state to  
11 make rules or to adjudicate. The term does not include the Governor, the Legislature, or the  
12 Judiciary.

13                  (3) “Agency action” means:

14                               (A) the whole or part of any agency order or rule;

15                               (B) the failure to issue an order or rule; or

16                               (C) an agency’s performing or failing to perform, any duty, function, or activity  
17 or to make any determination required by law.

18                  (4) “Agency head” means the individual in whom, or one or more members of the body  
19 of individuals in which, the ultimate legal authority of an agency is vested.

20                  (5) “Agency record” means the agency rulemaking record required by Section 302, the  
21 emergency rulemaking record in rulemaking governed by Section 309(a), the direct final  
22 rulemaking record in rulemaking governed by Section 309(b), the hearing record in adjudication  
23 required by Section 406, the hearing record in an emergency adjudication record under Section

1 407, and the hearing record in an informal adjudication record under Section 401A.

2 (6) “Contested case” means an adjudication in which an opportunity for an evidentiary  
3 hearing is required by the federal constitution or a federal statute or the constitution or a statute  
4 of this state.

5 (7) “Electronic” means relating to technology having electrical, digital, magnetic,  
6 wireless, optical, electromagnetic, or similar capabilities.

7 (8) “Electronic record” means a record created, generated, sent, communicated, received,  
8 or stored by electronic means.

9 (9) “Emergency adjudication” means an adjudication in a contested case when the public  
10 health, safety, or welfare requires immediate action.

11 (10) “Evidentiary hearing” means a hearing for the receipt of evidence on issues on  
12 which a decision of the presiding officer may be made in a contested case.

13 (11) “Final order” means the order issued by the agency head sitting as the presiding  
14 officer in a contested case.

15 (12) “Guidance document” means a record of general applicability developed by an  
16 agency that lacks the force of law but states the agency’s current approach to, or interpretation  
17 of, law, or general statements of policy that describe how and when the agency will exercise  
18 discretionary functions. The term does not include records described in subsections (27) (A), (B),  
19 (C), and (D).

20 (13) “Index” means a searchable list of items by subject and caption in a record with a  
21 page number, hyperlink, or any other connector that links the list with the record to which it  
22 refers.

23 (14) “Initial order” means an order that is subject to further agency review and is issued

1 by a presiding officer with final decisional authority.

2 (15) “Internet website” means a website on the Internet that permits the public to search  
3 a database that archives materials required to be published with the [publisher] under this [act].

4 (16) “Law” means the federal or state constitution, a federal or state statute, a federal or  
5 state judicial decision, a rule of court, an executive order that rests on statutory or constitutional  
6 authorization, or a rule or order of an agency.

7 (17) “License” means a permit, certificate, approval, registration, charter, or similar form  
8 of permission required by law and issued by an agency.

9 (18) “Licensing” means the grant, denial, renewal, revocation, suspension, annulment,  
10 withdrawal, or amendment of a license.

11 (19) “Notify” means to take steps reasonably required to inform a person, whether that  
12 person actually comes to know of it.

13 (20) “Order” means an agency decision that determines or declares the rights, duties,  
14 privileges, immunities, or other interests of a specific person.

15 (21) “Party” means the agency taking action, the person against which the action is  
16 directed, and any other person named as a party or permitted to intervene and that does intervene.

17 (22) “Person” means an individual, corporation, business trust, estate, trust, partnership,  
18 limited liability company, association, joint venture, public corporation, government or  
19 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

20 (23) “Presiding officer” means an individual who presides over the evidentiary hearing  
21 in a contested case.

22 (24) “Proceeding” means any type of formal or informal agency process or procedure  
23 commenced or conducted by an agency. The term includes adjudication, rulemaking, and

1 investigation.

2 (25) “Recommended order” means an order issued by a presiding officer other than the  
3 agency head when that presiding officer does not have final decisional authority and the order is  
4 subject to review by the agency head.

5 (26) “Record” means information that is inscribed on a tangible medium or that is stored  
6 in an electronic or other medium and is retrievable in perceivable form.

7 (27) “Rule” means the whole or a part of an agency statement of general applicability  
8 that implements, interprets, or prescribes law or policy or the organization, procedure, or practice  
9 requirements of an agency and has the force of law. The term does not include:

10 (A) statements concerning only the internal management of an agency and not  
11 affecting private rights or procedures available to the public;

12 (B) an intergovernmental or interagency memorandum, directive, or  
13 communication that does not affect private rights or procedures available to the public;

14 (C) an opinion of the Attorney General;

15 (D) a statement that establishes criteria or guidelines to be used by the staff of an  
16 agency in performing audits, investigations, or inspections, settling commercial disputes,  
17 negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if  
18 disclosure of the criteria or guidelines would enable persons violating the law to avoid detection,  
19 facilitate disregard of requirements imposed by law, or give an improper advantage to persons  
20 that are in an adverse position to the state;

21 (E) forms developed by an agency to implement or interpret agency law or  
22 policy; or

23 (F) guidance documents.

1 (28) “Rulemaking” means the process for adoption of a new rule or the amendment or  
2 repeal of an existing rule.

3 (29) “Sign” means, with present intent to authenticate or adopt a record:

4 (A) to execute or adopt a tangible symbol; or

5 (B) to attach to or logically associate with the record an electronic symbol, sound,  
6 or process.

7 (30) “Written” means inscribed on a tangible medium.

### 8 **Comment**

9 **Adjudication.** This definition gives the general meaning of adjudication that  
10 distinguishes it from rulemaking. See California Government Code Section 11405.20. This Act  
11 and the definitions in this Section also identify some categories of adjudication that require  
12 procedure specified in this Act to be used to reach a decision. For example, the term contested  
13 case, defines a subset of adjudications that must be conducted as prescribed in Article 4 of this  
14 Act.

15  
16 **Agency.** The object of this definition is to subject as many state actors as possible to this  
17 definition. See 1981 MSAPA Section 1-102(1). The exception for the governor means the  
18 governor personally. The term “agency” includes the Office of Administrative Hearings provided  
19 in Article 6.

20  
21 **Agency Action.** This definition is added for purposes of identifying those matters subject  
22 to judicial review. Failure to issue an order or rule is not judicially reviewable except as provided  
23 in Section 501(a) of the Act. Failure to issue an order or rule does not include an agency denial  
24 of a petition to initiate rulemaking. See Section 317 of the Act. This definition is taken from  
25 1981 MSAPA Section 1-102(2).

26  
27 **Agency Head.** This definition differentiates between the agency as an organic whole and  
28 the particular persons (commissioners, board members or the like) in whom final authority is  
29 vested. This definition is taken from 1981 MSAPA Section 1-102(3).

30  
31 **Contested case.** This term is similar to the “contested case” definition of the 1961  
32 MSAPA. Like the 1961 MSAPA, this Act looks to external sources such as statutes to describe  
33 situations in which a party is entitled to a hearing. However, this term differs from the 1961  
34 MSAPA’s term “contested case” because it also includes hearings required by the constitution,  
35 federal or state, and makes provision in Article 4 for the type of hearing to be held in a case  
36 where a constitution creates the right to a hearing. Including constitutionally created rights to a  
37 hearing within the provisions of this Act eliminates the problem of looking outside the Act to  
38 determine the type of hearing required in cases where the right to the hearing is created by

1 constitution. Hearing rights created by judicial decisions means constitutional decisions by courts  
2 in that state. See *Goldberg v. Kelley*, 397 U.S. 254 (1970), and *Goss v. Lopez* 419 U.S. 565  
3 (1975). Contested cases do not include investigatory hearings, pure administrative process  
4 proceedings such as tests, elections, or inspections, and situations in which a party has a right to  
5 a de novo administrative or judicial hearing. See Section 401 of the Act. An agency may by rule  
6 make all or part of article 4 applicable to adjudication that does not fall within the requirements  
7 of Section 401, including hearing rights conferred by agency regulations. See California  
8 Government Code Section 11410.10. The scope of hearing rights is governed by law other than  
9 this act.

10  
11 Record. Modern electronic-age statutes such as the Uniform Computer Information  
12 Transactions Act and the Uniform Electronic Transactions Act adopt a broad definition of the  
13 term record that includes the term document. This act follows those definitions.

14  
15 Electronic. The term “electronic” refers to the use of electrical, digital, magnetic,  
16 wireless, optical, electromagnetic and similar technologies. It is a descriptive term meant to  
17 include all technologies involving electronic processes. The listing of specific technologies is not  
18 intended to be a limiting one. The definition is intended to assure that this act will be applied  
19 broadly as new technologies develop. For example, biometric identification technologies would  
20 be included if they affect communication and storage of information by electronic means. As  
21 electronic technologies expand and include other competencies, those competencies should also  
22 be included under this definition. The definition of the term “electronic” in this act has the same  
23 meaning as it has in UETA SECTION 2(5) and in the Uniform Real Property Electronic  
24 Recording Act.

25  
26 Electronic Record. This definition is identical to § 2(7) of the Uniform Electronic  
27 Transactions Act. An “electronic record” is a document that is in an “electronic” form.  
28 Documents may be communicated in electronic form; they may be received in electronic form;  
29 they may be recorded and stored in electronic form; and they may be received in paper copies  
30 and converted into an electronic record. This Act does not limit the type of electronic documents  
31 received by the [publisher]. The purpose of defining and recognizing electronic documents is to  
32 facilitate and encourage agency use of electronic communication and maintenance of electronic  
33 records.

34  
35 Emergency Adjudication. This definition is designed to be used with the emergency  
36 adjudication procedures provided by Section 408. The danger to the public health, safety, or  
37 welfare standard requiring immediate action is a strict standard that is defined by law other than  
38 this Act. Federal and state case law have held that in an emergency situation an agency may act  
39 rapidly and postpone any formal hearing without violation, respectively, of federal or state  
40 constitutional law. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Gilbert v. Homar* (1997) 520 U.S.  
41 924; *Dep’t of Agric. v. Yanes*, 755 P.2d 611 (OK. 1987).

42  
43 Guidance document. This definition is taken from the Michigan APA, M.C.L.A.  
44 24.203(6), and the Virginia APA, Va. Code Ann. SECTION 2.2-4001. See also the; Idaho I.C.  
45 SECTION 67-5250 and N.Y. McKinneys State Administrative Procedure Act, SECTION 102.  
46 This is a definition intended to recognize that there exist agency statements for the guidance of

1 staff and the public that differ from, and that do not constitute, rules. Many states recognize such  
2 statements under the label “interpretive statement” or “policy statement.” See Wash. Rev. Code,  
3 SECTION 34.05.010(8) & (15). Later sections of this Act will provide for the publication and  
4 availability of this type of record so that they are not “secret” records. See: Michael Asimow,  
5 Guidance Documents in the States, 54 Adm. L. Rev. 631 (2002); Michael Asimow, California  
6 Underground Regulations, 44 Adm. L. Rev. 43 (1992).

7  
8 Index. The definition of index has been added as a guide to agencies, [publisher]s and  
9 editors about their duties to make records available and easily accessible to the public in the form  
10 of an index, as that term is used throughout this act.

11  
12 Internet website. This definition is designed to be used by agencies and publishers to  
13 comply with the requirements of Sections 201, 316, and 419 of this Act. In many states, the  
14 Internet website is maintained by the [publisher], and in some states, like California, the agency  
15 will also maintain its own Internet website.

16  
17 Law. Law includes an executive order that rests on statutory or constitutional  
18 authorization. See Kevin M. Stack, “The Statutory President,” 90 Iowa L. Rev. 539, 550-52  
19 (2005); Jim Rossi, “State Executive Law making in Crisis,” 56 Duke L. Rev. 237, 261-64  
20 (2006).

21  
22 License. The definition of license is drawn largely from the 1961 MSAPA.

23  
24 Order. Unlike the federal APA which defines rule, but not order, this section provides a  
25 positive definition of order based on case law and agency experience. The key concept is that an  
26 order includes solely agency legal determinations that are addressed to particular, specific,  
27 identified individuals in particular circumstances. An order may be addressed to more than one  
28 person. Further, the definition is consistent with modern law in rejecting the right/privilege  
29 distinction in constitutional law. The addition of the language “or other interests” is intended to  
30 clarify this change and to include entitlements. See also Cal.Gov.Code SECTION 11405.50.

31  
32 Party. This definition includes the agency, any person against whom agency action is  
33 brought and any person who intervenes. Its terms also include any person who may participate  
34 in a rulemaking proceeding, such as someone who offers a comment. This section is not  
35 intended to deal with the issue of a person’s entitlement to review. Standing and other issues  
36 relating to judicial review of agency action are addressed in Article 5 of this Act.

37  
38 Presiding Officer. This definition includes an agency staff member, an administrative  
39 law judge or one or more members of the agency head when designated to preside at a hearing.

40  
41 Person. The definition of a “person” is the standard definition for that term used in acts  
42 adopted by the National Conference of Commissioners on Uniform State Laws. It includes  
43 individuals, associations of individuals, and corporate and governmental entities.

44  
45 Rule. The essential part of this definition is the requirement of general applicability of  
46 the statement. This criterion distinguishes a rule from an order, which focuses upon particular

1 applicability to identified parties only. Applicability of a rule may be general, even though at the  
2 time of the adoption of the rule there is only one person or firm affected: persons or firms in the  
3 future who are in the same situation will also be bound by the standard established by such a  
4 rule. It is sometimes helpful to ask in borderline situations what the effect of the statement will  
5 be in the future. If unnamed parties in the same factual situation in the future will be bound by  
6 the statement, then it is a rule. The word “statement” has been used to make clear that, regardless  
7 of the term that an agency uses to describe a declaration or publication and whether it is internal  
8 or external to the agency, if the legal operation or effect of the agency action is the same as a  
9 substantive rule, then it meets this definition. The exceptions to the definition are widely used in  
10 state APAs. Subsection 26(A) is drawn from 1981 Model State APA § 3-116(1). Subsection  
11 26(E) is drawn from 1981 Model State APA § 3-116(9). Subsection 26(F) is drawn from 1981  
12 Model State APA § 3-116(2). Subsection 26(H) is based on 1981 Model State APA § 3-116(7).

13  
14 Written. This definition relates to the definition of record in Section 102(25) in that  
15 written documents are inscribed on a tangible medium. The definition of record in Section  
16 102(25) includes both tangible medium (written) and electronic documents.

17  
18 **SECTION 103. APPLICABILITY.** This [act] applies to each agency unless the  
19 agency is expressly exempted by a statute of this state.

#### 20 **Comment**

21 This section is intended to define which agencies are subject to the provisions of this act.  
22 Many states have made use of an applicability provision to define the coverage of their  
23 Administrative Procedure Act. See: Iowa, I.C.A. SECTION 17A.23; Kansas, K.S.A. SECTION  
24 77-503; Kentucky, KRS SECTION 13B.020; Maryland, MD Code, State Government,  
25 SECTION 10-203; Minnesota, M.S.A. SECTION 14.03; Mississippi, Miss. Code Ann.  
26 SECTION 25-43-1.103; Washington, West’s RCWA 34.05.020.  
27



1 [ARTICLE] 2

2 PUBLIC ACCESS TO AGENCY LAW AND POLICY

3 SECTION 201. PUBLICATION, COMPILATION, INDEXING, AND PUBLIC  
4 INSPECTION OF RULEMAKING DOCUMENTS; ORDERS.

5 (a) The [publisher] shall administer this section and other sections of this [act] that  
6 require publication.

7 (b) The [publisher] shall publish all rulemaking-related documents listed in this  
8 subsection (n) (1), (2), (3), and (4) in [electronic and written] [electronic or written] [electronic]  
9 [written] format. The [publisher] shall prescribe a uniform numbering system, form, and style for  
10 all proposed, adopted, and amended rules.

11 (c) The [publisher] shall maintain the official record of the adoption, amendment, and  
12 repeal of rules, including the text of the rule and any supporting documents, filed with the  
13 [publisher] by an agency. An agency adopting, amending, or repealing a rule shall maintain the  
14 rulemaking record required by Section 302(b) for that rule.

15 (d) The [publisher] shall create and maintain an Internet website [or other appropriate  
16 technology] on which it maintains a searchable database. The [administrative bulletin and  
17 administrative code] and any guidance document filed with the [publisher] by an agency must be  
18 made available on the Internet website [or other appropriate technology].

19 (e) The [administrative bulletin] must be published by the [publisher] at least once [each  
20 month].

21 (f) The [administrative bulletin] must be provided in written form upon request, for which  
22 the [publisher] may charge a reasonable fee.

23 (g) The [administrative bulletin] must contain:

1 (1) notices of the proposed adoption, amendment, or repeal of a rule prepared so  
2 that the text of the proposed rule shows the text of any existing rule proposed to be changed and  
3 the change proposed;

4 (2) newly filed rules prepared so that the text of a newly filed amended rule  
5 shows the text of the existing rule and the change that is made;

6 (3) any other notice and material required to be published in the [administrative  
7 bulletin]; and

8 (4) an index.

9 (h) The [administrative code] must be compiled, indexed by subject, and published in a  
10 format and medium as prescribed by the [publisher]. The rules of each agency must be published  
11 and indexed in the [administrative code].

12 (i) The [publisher] shall make available for public inspection and, and at a reasonable  
13 charge, copying the [administrative bulletin] and the [administrative code].

14 (j) The [publisher] may make minor nonsubstantive corrections in spelling, grammar, and  
15 format in proposed or adopted rules after notification to the agency. The [publisher] shall make a  
16 record of the corrections.

17 (k) The [publisher] shall make available on the [publisher's] Internet website, at no  
18 charge, all of the documents provided by each agency under subsection (n).

19 (l) Unless a particular record is exempt from disclosure under law other than this [act],  
20 an agency shall publish on its website and, for a reasonable charge, make available through the  
21 regular mail upon request, each notice of proposed rulemaking under Section 304, each rule filed  
22 under Section 315, each summary of regulatory analysis required by Section 305, each  
23 declaratory order issued under Section 203, the index of declaratory orders prepared pursuant to

1 Section 203(g), each guidance document issued pursuant to Section 310, the index of currently  
2 effective guidance documents prepared pursuant to Section 310(f), each final order in a contested  
3 case issued pursuant to Section 418, and the index of final orders in contested cases prepared  
4 pursuant to Section 418(a).

5 (m) An agency may provide for electronic distribution of notices related to rulemaking  
6 or guidance documents to a person that requests it. If a notice is distributed electronically, the  
7 agency need not transmit the actual notice but must send all the information contained in the  
8 notice.

9 (n) Each agency shall file with the [publisher] in an electronic format acceptable to the  
10 [publisher]:

11 (1) the notice of the adoption, amendment, or repeal of a rule;

12 (2) a summary of the regulatory analysis required by Section 305 for each  
13 proposed rule;

14 (3) each adopted, amended, or repealed rule;

15 (4) an index of currently effective guidance documents under Section 310(f);

16 (5) any other notice or matter that an agency is required to publish under this  
17 [act].

18 **Legislative Note:** Throughout this act the drafting committee has used the term [publisher] to  
19 describe the official or agency to which substantive publishing functions are assigned. All states  
20 have such an official, but their titles vary. Each state using this act should determine what that  
21 agency is, then insert its title in place of [publisher] throughout this act. Each state also has an  
22 [administrative bulletin] and an [administrative code]. The bulletin is similar to the federal  
23 register, and the code is similar to the code of federal regulations. The names of the  
24 administrative bulletin and the administrative code vary from state to state. Each state should  
25 insert the proper title in place of [administrative bulletin], and [administrative code].

## 26 27 **Comment**

28  
29 This section seeks to assure adequate notice to the public of proposed agency action. It

1 also seeks to assure adequate record keeping and availability of records for the public. Article 2  
2 is intended to provide easy public access to agency law and policy that are relevant to agency  
3 process. Article 2 also adds provisions for electronic publication of the administrative bulletin  
4 and code. Section 201 does not address the issue related to what languages rules should be  
5 published in, nor does it address issues related to translation of information contained in these  
6 documents into languages other than English. Rulemaking documents include materials in  
7 written or electronic form that are related to an agency rulemaking proceeding, or that are  
8 guidance documents in written or electronic form. Subsection (b) provides for publication of  
9 rulemaking documents in alternative written and/or electronic formats. Publishers that administer  
10 the provisions of this subsection must also comply with the applicable provisions of the federal  
11 E-Sign Act (15 U.S.C. Section 7001 to 7031) and the Uniform Electronic Transactions Act  
12 (UETA).

13  
14 The arrival of the Internet and electronic information transfer, which occurred after the  
15 last revision of the Model State Administrative Procedure Act, has revolutionized  
16 communication. It has made available rapid, efficient and low cost communication and  
17 information transfer. Many states as well as the federal agencies have found that it is an ideal  
18 medium for communication between agencies and the public, especially in connection with  
19 rulemaking. Since the last Model Administrative Procedure Act was written, many states have  
20 adopted various types of statutes that permit agencies to use electronic technology to  
21 communicate with the public. The agencies have found this technology particularly useful in  
22 connection with rulemaking.

23  
24 Subsection (c) requires that the [publisher] maintain the official record for adopted rules,  
25 including the text of the rules and any supporting documents, filed by the agency. Subsection (c)  
26 also requires that the agency adopting the rule maintain the rulemaking record for that rule.  
27 Section 302(b) provides the requirements for the rulemaking record.

28  
29 Subsection (d) requires the [publisher] to 1) maintain an Internet website, and 2) publish  
30 all matters required to be published under this act on that website. If a state chooses to use  
31 subsection (d), they will create a centralized website for use by all agencies. Subsection (d) also  
32 requires that the [publisher] publish agency guidance documents filed by the agency with the  
33 [publisher]. See section 202(4) and Section 310, below. Subsection (d) does not address issues  
34 related to authentication, preservation and archival storage of electronic documents published on  
35 an Internet website. Subsection (d) does not address the principles for deciding what rules are in  
36 effect and enforceable at a specific point in time. Providing a hypertext link on an internet  
37 website will satisfy the publication requirements for agencies and publishers.

38  
39 Subsection (f) requires the publisher to provide the administrative bulletin in written form  
40 upon request, for which the publisher may charge a reasonable fee. This requirement can be  
41 satisfied by states making the administrative bulletin available on the Internet, searchable, and  
42 printable.

43  
44 The bracketed text of subsection (g)(1) and (g)(2) is included so that agencies may utilize  
45 redlining or underlining and striking of the text of the proposed or adopted rules so that changes  
46 from the existing text of the rule are clearly delineated. Agencies that are proposing or adopting

1 new rules or that have some other system for showing changes need not use the bracketed text.

2  
3 It is possible to go much further in providing for use of the Internet that the publication  
4 adopted here. For example, a state could choose to permit agencies to operate their own  
5 websites, and to accept comments on rules on the website. They could also provide for  
6 maintenance of a database of all comments received that the public could access. These  
7 provisions are extremely useful, but may be quite expensive. The central system adopted here,  
8 means only one Internet website is required. In terms of cost benefit, this is an effective method  
9 of providing for electronic communication and agency access.

10  
11 Subsection (h) requires the publisher to index the administrative code by subject. States  
12 can satisfy this requirement by providing an administrative code that is searchable by word on  
13 the Internet.

14  
15 Subsection (j) provides for a limited non substantive power to edit agency rules provided  
16 that the agency is notified by the rules [publisher] of the changes. Subsection (j) is based on the  
17 Maine Administrative Procedure Act, 5 M.R.S.A. Section 8056(10).

18  
19 Subsections (k) and (l) are drawn from the Washington Administrative Procedure Act.  
20 See WA ST 34.05.260.

## 21 22 **SECTION 202. REQUIRED AGENCY RULEMAKING AND**

23 **RECORDKEEPING.** In addition to rulemaking requirements imposed by law other than this  
24 [act], each agency shall:

25 (1) publish a description of its organization, stating the general course and method of its  
26 operations and the methods by which the public may obtain information or make submissions or  
27 requests;

28 (2) publish a description of all formal and informal procedures available, including a  
29 description of all forms and instructions used by the agency;

30 (3) publish a description of the process for application for a license, available benefits, or  
31 other matters for which an application is appropriate, unless the process is prescribed by law  
32 other than this [act];

33 (4) adopt rules for the conduct of public hearings [if the default procedural rules adopted  
34 under Section 204 do not include provisions for the conduct of public hearings]; [and]

1 (5) maintain [custody of] the agency’s current rulemaking docket required by Section  
2 302(b)[; and

3 (6) maintain a separate, official, current, and dated index and compilation of all rules  
4 adopted under [Article] 3, make the index and compilation available at agency offices for public  
5 inspection and, at a reasonable cost, copying [and online on the [publisher]’s Internet website],  
6 update the index and compilation at least [monthly], and file the index and the compilation and  
7 all changes to both with the [publisher]].

### 8 **Comment**

9  
10 One object of this section is to make available to the public all procedures followed by  
11 the agency, including especially how to file for a license or benefit. It is modeled on the 1961  
12 Model State Administrative Procedure Act, Sections 2(a) (4) & 2(b), the 1981 Model State APA  
13 Sections 2-104(1), (2), and the Kentucky Administrative Procedure Act, KRS Section 13A.100.  
14 Persons seeking licenses or benefits should have a readily available and understandable reference  
15 sources from the agency. A second reason is to eliminate “secret law” by making all guidance  
16 documents used by the agency available from the agency. Subsections (1), (2), (3), and (4)  
17 require the agency to codify by rule the description of the organization of the agency and the  
18 procedures followed by the agency. Agencies could use direct final rulemaking procedures  
19 under Section 309(b) to adopt some of the rules required by subsections (1), (2), (3), and (4).  
20 Some states provide more detail in subsection (1) including contact information for agency  
21 officials and organizational charts.

22  
23 Subsection (5) requires agencies to file guidance documents with the publisher. Section  
24 310(e) requires that agencies publish all current guidance documents. In states where the  
25 publisher has the sole responsibility for publishing agency rules and other documents, including  
26 guidance documents, an agency may satisfy the publication requirement by filing the guidance  
27 document with the publisher under subsection (5).

### 28 **SECTION 203. DECLARATORY ORDER.**

29  
30 (a) Any interested person may petition an agency for a declaratory order that states  
31 whether or in what manner a rule, guidance document, or order issued by the agency applies to  
32 the petitioner.

33 (b) Each agency shall adopt rules prescribing the form of a petition for purposes of  
34 subsection (a) and the procedure for its submission, consideration, and prompt disposition. The

1 provisions of this [act] for formal, informal, or other applicable hearing procedure do not apply  
2 to an agency proceeding for a declaratory order, except to the extent provided in this [article] or  
3 to the extent the agency provides by rule or order.

4 (c) Not later than 60 days after receipt of a petition pursuant to subsection (a), an agency  
5 shall issue a declaratory order in response to the petition, decline to issue a declaratory order, or  
6 schedule the matter for further consideration.

7 (d) If an agency declines to issue a declaratory order as requested under subsection (a), it  
8 shall promptly notify the petitioner in a record of its decision and include a brief statement of the  
9 reasons for declining. An agency decision to decline to issue a declaratory order is subject to  
10 judicial review for abuse of discretion.

11 (e) If an agency issues a declaratory order, the order must contain the names of all parties  
12 to the proceeding, the facts on which it is based, and the reasons for the agency's conclusion. If  
13 an agency is authorized not to disclose certain information in its records in order to protect  
14 confidentiality, the agency may redact confidential information in the declaratory order. A  
15 declaratory order has the same status and binding effect as an order issued in an adjudication,  
16 and is subject to judicial review under Section 501.

17 (f) An agency shall publish each currently effective declaratory order.

18 (g) An agency shall maintain an index of all of its current declaratory orders, file the  
19 index with the [publisher] [annually], make the index readily available for public inspection, and  
20 make available for public inspection and, at a reasonable cost, copying of the full text of all  
21 declaratory orders to the extent inspection is permitted by law other than this [act].

## 22 **Comment**

23  
24 This section embodies a policy of creating a convenient procedural device that will  
25 enable parties to obtain reliable advice from an agency. Such guidance is valuable to enable

1 citizens to conform with agency standards as well as to reduce litigation. It is based on the 1981  
2 MSAPA, Section 2-103 and Hawaii Revised Statutes, Section 91-8.

3  
4 Subsection (d) provides that agency decisions to decline to issue a declaratory order are  
5 reviewable for abuse of discretion (See Massachusetts v. EPA 127 S. Ct. 1438 (2007) (EPA  
6 decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated  
7 with global warming was judicially reviewable and decision was arbitrary and capricious.).  
8 limited agency resources may provide a valid basis for an agency to decline to issue a declaratory  
9 order.

10  
11 Subsection (e) is based on the California APA, West's Ann.Cal.Gov.Code Section  
12 11465.60; and the Washington APA, West's RCWA 34.05.240. A declaratory decision issued  
13 by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory  
14 proceeding, and the agency, unless reversed or modified on judicial review; and has the same  
15 precedential effect as other agency adjudications. A declaratory decision, like other decisions,  
16 only determines the legal rights of the particular parties to the proceeding in which it was issued.  
17 The requirement in subdivision (e) that each declaratory decision issued contain the facts on  
18 which it is based and the reasons for its conclusion will facilitate any subsequent judicial review  
19 of the decision's legality. It also ensures a clear record of what occurred for the parties and for  
20 persons interested in the decision because of its possible precedential effect.

21  
22 Subsections (f), and (g) require that an agency publish and index all current declaratory  
23 orders.

#### 24 **SECTION 204. DEFAULT PROCEDURAL RULES.**

25  
26 (a) The [governor] [attorney general] [designated state agency] shall adopt default  
27 procedural rules for use by agencies. The default rules must provide for the procedural functions  
28 and duties of as many agencies as is practicable.

29 (b) Except as otherwise provided in subsection (c), an agency shall use the default  
30 procedural rules published under subsection (a).

31 (c) An agency may adopt a rule of procedure that differs from the default procedural  
32 rules adopted under subsection (a) by adopting a rule that states with particularity the need and  
33 reasons for the variation from the default procedural rules.

#### 34 **Comment**

35 This Section is based on Section 2-105 of the 1981 MSAPA. See also the provisions of  
36 the California Administrative Procedure Act, California Government Code Section 11420.20



1 (adoption of model alternative dispute resolution regulations by California Office of  
2 Administrative Hearings.) One purpose of this provision is to provide agencies with a set of  
3 procedural rules. This is especially important for smaller agencies. Another purpose of this  
4 section is to create as uniform a set of procedures for all agencies as is realistic, but to preserve  
5 the power of agencies to deviate from the common model where necessary because the use of the  
6 model rules is demonstrated to be impractical for that particular agency. This section requires all  
7 agencies to use the model rules as the basis for the rules that they are required to adopt under  
8 Section 202. An agency may deviate from the model rules only for impracticability.

1 [ARTICLE] 3

2 RULEMAKING; ADOPTION AND EFFECTIVENESS OF RULES

3 SECTION 301. CURRENT RULEMAKING DOCKET.

4 (a) In this section, “rule” does not include a rule adopted using the emergency process  
5 under Section 309(a) or a rule adopted using the direct final process under Section 309(b).

6 (b) Each agency shall maintain a current rulemaking docket that is indexed.

7 (c) A current rulemaking docket must list each pending rulemaking proceeding. The  
8 docket must state or contain:

9 (1) the subject matter of the proposed rule;

10 (2) notices related to the proposed rule;

11 (3) how comments may be submitted;

12 (4) the time within which comments may be submitted;

13 (5) where comments may be inspected;

14 (6) requests for a public hearing;

15 (7) appropriate information about a public hearing, if any, including the names of  
16 the persons making the request; and

17 (8) the timetable for action.

18 (d) Upon request, the agency shall provide, at a reasonable cost, a written rulemaking  
19 docket.

20 **Comment**

21  
22 This section is modeled on Minn. M.S.A. Section 14.366. This section and the following  
23 section, Section 302 state the minimum docketing and rulemaking record keeping requirements  
24 for all agencies. This section also recognizes that many agencies use electronic recording and  
25 maintenance of dockets and records. However, for smaller agencies, the use of electronic  
26 recording and maintenance may not be feasible. This section therefore permits the use of  
27 exclusively written, hard copy dockets. The current rulemaking docket is a summary list of

1 pending rulemaking proceedings or an agenda referring to pending rulemaking. This section  
2 includes direct final rules governed by Section 309.

3  
4 **SECTION 302. AGENCY RECORD IN RULEMAKING PROCEEDING.**

5 (a) An agency shall maintain a rulemaking record for each rule it proposes to adopt. The  
6 record and materials incorporated by reference must be readily available for public inspection in  
7 the central office of the agency and available for public display on the Internet website  
8 maintained by the [publisher], unless the record and materials are privileged or exempt from  
9 disclosure under state law other than this [act]. If an agency determines that any part of the  
10 rulemaking record cannot practicably be displayed or is inappropriate for public display on the  
11 Internet website, the agency shall describe the document and shall note on the Internet website  
12 that the document is not displayed.

13 (b) A rulemaking record must contain:

14 (1) a copy of all publications in the [administrative bulletin] relating to the rule or  
15 the proceeding upon which the rule is based;

16 (2) a copy of any part of the rulemaking docket containing entries relating to the  
17 rule or the proceeding upon which the rule is based;

18 (3) a copy or an index of written factual material, studies, and reports relied on or  
19 consulted by agency personnel in formulating the proposed or final rule;

20 (4) any official transcript of oral presentations made in the proceeding upon  
21 which the rule is based or, if not transcribed, any audio recording or verbatim transcript of the  
22 presentations, any memorandum summarizing the contents of those presentations prepared by the  
23 agency official who presided over the hearing;

24 (5) a copy of the rule and explanatory statement filed with the [publisher]; and

25 (6) all petitions for any agency action on the rule, except for petitions governed

1 by Section 203.

## 2 **Comment**

3  
4 Several states have adopted this type of agency rule-making record provisions: Az.,  
5 A.R.S. Section 41-1029; Colo., C.R.S.A. Section 24-4-103; Minn., M.S.A. Section 14.365;  
6 Miss., Miss. Code Ann. Section 25-43-3.110; Mont., MCA 2-4-402; Okl., 75 Okl.St. Ann.  
7 Section 302; and Wash., RCWA 34.05.370.

8  
9 The language of subsection (a) is based on Section 3-112(a) of the 1981 Model Act.  
10 Similar language is found in the Washington Administrative Procedures Act, RCWA Section  
11 34.05.370. The requirement of an official agency rulemaking record in subsection (a) should  
12 facilitate a more structured and rational agency and public consideration of proposed rules. It  
13 will also aid the process of judicial review of the validity of rules. The requirement of an official  
14 agency rulemaking record was suggested for the Federal Act in S. 1291, the “Administrative  
15 Practice and Regulatory Control Act of 1979,” title I, Section 102(d), [5 U.S.C. 553(d) ], 96  
16 Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy). The second sentence of  
17 subsection (a) is intended to exclude privileged material from disclosure and display. Privileged  
18 material includes confidential business information and trade secrets, as well as internal advice  
19 memoranda. The exemptions in the state open records laws would be examples of records and  
20 materials that are exempt from disclosure and display under law other than this act. The third  
21 sentence in subsection (a) is intended to enable an agency to decide, for example, that indecent  
22 material or copyrighted material should be available for inspection in hard copy but not posted  
23 on the Internet. It is not intended to authorize exclusion from the Internet record of, for example,  
24 information that reflects adversely on the government.

25  
26 Subsection (b) requires *all written* submissions made to an agency and *all written*  
27 materials considered by an agency in connection with a rulemaking proceeding to be included in  
28 the record. It also requires a copy of any existing record of oral presentations made in the  
29 proceeding to be included in the rulemaking record. The language in Subsection (b) (3) is based  
30 on language adopted by the ABA. See ABA Section of Administrative Law and Regulatory  
31 Practice, “A Blackletter Statement of Federal Administrative Law,” 54 Admin. L. Rev. 1, 34  
32 (2002)

## 33 34 **SECTION 303. ADVANCE NOTICE OF RULEMAKING; NEGOTIATED** 35 **RULEMAKING.**

36 (a) An agency may gather information relevant to the subject matter of rulemaking and  
37 may solicit comments and recommendations from the public by publishing an advance notice of  
38 rulemaking in the [administrative bulletin] and indicating where, when, and how persons may  
39 comment.

40 (b) An agency may engage in negotiated rulemaking by appointing a committee to

comment or make recommendations on the subject matter of a rulemaking under active consideration within the agency. The committee, in consultation with one or more agency representatives, may attempt to reach a consensus on the terms or substance of a proposed rule. In making appointments, the agency shall attempt to establish a balance in representation among persons known to have an interest and members of the public. The agency shall publish a list of all committees with their membership at least [annually] in the [administrative bulletin]. Notice of a meeting of a committee appointed under this subsection must be published in the [administrative bulletin] at least [15 days] before the meeting. A meeting of a committee appointed under this section is open to the public.

(c) This section does not prohibit an agency from obtaining information and opinions from members of the public on the subject of the rulemaking by any other method or procedure used in rulemaking.

### **Comment**

This section is based upon the provisions of Section 3-101 of the 1981 MSAPA. Seeking advice before proposing a rule frequently alerts the agency to potential serious problems that will change the notice of proposed rulemaking and the rule ultimately adopted. This section is designed to encourage gathering information. It is not intended to prohibit any type of reasonable agency information gathering activities; however, the section seeks to insure that agencies act in a fashion that will result in a balance among interested groups from whom information is received. The advanced notice of proposed rulemaking under subsection (a) is a preliminary step for seeking information and is not the same as the notice of proposed rulemaking under Section 304, which begins the rulemaking process.

Several states have enacted provisions of this type in their APAs. Some of them merely authorize agencies to seek informal input before proposing a rule; several of them indicate that the purpose of this type of provision is to promote negotiated rulemaking. Those states are Idaho, I.C. ' 67-5220; Minnesota, M.S.A. § 14.101; Montana, MCA 2-4-304; and Wisconsin, W.S.A. 227.13. Subsection (b) is intended to authorize negotiated rulemaking.

Subsection (c) authorizes agencies to use other methods to obtain information and opinions. Under subsection (c), agencies may meet informally with specific stakeholders to discuss issues raised in the negotiated rulemaking process. Negotiated rulemaking under subsection (b) is an option for agency use but is not required to be used prior to starting a

1 rulemaking proceeding. Negotiated rulemaking committees are also used in federal  
2 administrative law. See the federal Negotiating Rulemaking Act, 5 U.S.C. Sections 561 to 570.

3  
4 **SECTION 304. NOTICE OF PROPOSED RULEMAKING.**

5 (a) Not later than [30] days before the adoption, amendment, or repeal of a rule, an  
6 agency shall file notice of the proposed action with the [publisher] for publication in the  
7 [administrative bulletin]. The publisher shall publish the notice in the next issue of the  
8 [administrative bulletin]. The notice must include:

- 9 (1) a short explanation of the purpose of the proposed action;
- 10 (2) a citation or reference to the specific legal authority authorizing the proposed  
11 action;
- 12 (3) the text of any rule proposed to be adopted, amended, or repealed;
- 13 (4) how a copy of the full text of the regulatory analysis of any rule proposed to  
14 be adopted, amended, or repealed may be obtained;
- 15 (5) where, when, and how a person may comment on the proposed action and  
16 request a hearing;
- 17 (6) a citation to and summary of each scientific or statistical study, report, or  
18 analysis that served as a basis for the proposed rulemaking, together with an indication of how  
19 the full text may be obtained; and
- 20 (7) a concise summary of any regulatory analysis prepared under Section 305(d).

21 (b) Not later than three days after publication of the notice of the proposed rulemaking in  
22 the [administrative bulletin], the agency shall mail the notice or send it electronically to each  
23 person that makes a timely request to the agency for a mailed or electronic copy of the notice. An  
24 agency may charge a reasonable fee for written mailed copies if the person makes a request for a  
25 mailed copy.

1 **Comment**

2  
3 Many states have similar provisions to provide notice of proposed rulemaking to the  
4 public. This section is based upon the provisions of Section 3-103 of the 1081 MSAPA.  
5 Rulemaking is defined in Section 102(28). The publisher has the responsibility to publish a  
6 notice of proposed rulemaking under Section 201(g)(1). Subsection (b) requires that individual  
7 notice of the proposed rulemaking be provided in written or electronic form to each individual  
8 who has made a timely request to the agency. To be timely under this subsection, the request  
9 would have to be made prior to the publication of the notice of proposed rulemaking.

10  
11 Subsection (a)(6) This language is adapted from N.Y. APA § 202-a. This language also  
12 codifies requirements used in federal administrative law. In the federal cases, disclosure of  
13 technical information underlying a rule has been deemed essential to effective use of the  
14 opportunity to comment. See *American Radio Relay League v. FCC*, 2008 WL 1838387 (D.C.  
15 Cir. April 25, 2008); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

16  
17 **SECTION 305. REGULATORY ANALYSIS.**

18 (a) An agency shall prepare a regulatory analysis for a rule proposed to be adopted,  
19 amended, or repealed that has an estimated economic impact of more than [\$ ]. The analysis  
20 must be completed before the notice of proposed rulemaking is published. A summary of the  
21 analysis must be published when the notice of proposed rulemaking is given.

22 (b) If a proposed rule has an economic impact of less than [\$ ], the agency shall  
23 prepare a statement of minimal estimated economic impact.

24 (c) A regulatory analysis must contain:

25 (1) an analysis of the benefits and costs of a reasonable range of regulatory  
26 alternatives reflecting the scope of discretion provided by the statute authorizing the rule; and

27 (2) a determination whether:

28 (A) the benefits of the rule justify the costs of the rule; and

29 (B) the rule will achieve the objectives of the authorizing statute in a more  
30 cost effective manner, or with greater net benefits, than other regulatory alternatives.

31 (d) An agency preparing a regulatory analysis under this section shall prepare a concise

summary of the analysis.

(e) An agency preparing a regulatory analysis under this section shall submit the analysis to the [appropriate state agency].

(f) If the agency has made a good faith effort to comply with this section, a rule is not invalid solely because the contents of the regulatory analysis of the rule are insufficient or inaccurate.

**Legislative Note:** State laws vary as to which state agency or body that an agency preparing the regulatory analysis should submit that analysis to. In some states, it is the department of finance or revenue, in others it is a regulatory review agency, or regulatory review committee. The appropriate state agency in each state should be inserted into the brackets.

#### Comment

Regulatory analyses are widely used as part of the rulemaking process in the states. States should set the dollar amount of estimated economic impact for triggering the regulatory analysis requirement of this section at a fairly high dollar amount as they deem appropriate or by other approach make the choice to prepare regulatory analyses carefully so that the number of regulatory analyses prepared by any agency are limited in number. The subsection also provides for submission to the rules review entity in the state, if the state has one. States that already have regulatory analysis laws can utilize the provisions of Section 305 to the extent that this section is not inconsistent with existing law other than this act. Agencies may rely upon agency staff expertise and information provided by interested stakeholders and participants in the rulemaking process. Agencies are not required by this act to hire and pay for private consultants to complete regulatory impact analysis. The concise summary of the regulatory analysis required by subsection (d) means a short statement that contains the major conclusions reached in the regulatory analysis.

#### SECTION 306. PUBLIC PARTICIPATION.

(a) An agency proposing the adoption, amendment, or repeal of a rule shall specify a public comment period of at least [30] days after publication of the notice of proposed rulemaking during which a person may submit information and comment on the rule proposed for adoption, amendment, or repeal. The information or comment may be submitted electronically or in written form.

(b) An agency shall consider all information and comment on a rule proposed for



1 adoption, amendment, or repeal which is submitted within the comment period under subsection  
2 (a).

3 (c) Unless a hearing is required by law other than this [act], an agency is not required to  
4 hold a hearing on a rule proposed for adoption, amendment, or repeal. If an agency holds a  
5 hearing, the agency may allow a person to make an oral presentation with information and  
6 comment about the rule. Hearings must be open to the public and must be recorded. A hearing on  
7 a rule proposed to be adopted, amended, or repealed must be held not later than [10] days before  
8 the end of the public comment period.

9 (d) A hearing on a rule proposed for adoption, amendment, or repeal may not be held  
10 earlier than [20] days after notice of its location, date, and time is published in the  
11 [administrative bulletin].

12 (e) An agency representative shall preside at a hearing on a rule proposed for adoption,  
13 amendment, or repeal. If the presiding agency representative is not the agency head, the  
14 representative shall prepare a memorandum summarizing the contents of the presentations made  
15 at the hearing for consideration by the agency head.

16 **Legislative Note:** state laws vary on the length of public comment periods and on whether or not  
17 a rulemaking hearing is required. The bracketed number of days in subsections (a), and (d)  
18 should be interpreted to require that if a rulemaking hearing is held, it will be held before the  
19 end of the public comment period. In that case, the minimum time period would be 50 days  
20 rather than 30 days.

## 21 22 **Comment**

23  
24 This section gives discretion to the agency about whether to hold an oral hearing on  
25 proposed rules in the absence of a statutory or constitutional requirement that an oral hearing be  
26 held. The agency representative described in subsection (e) need not be an officer or employee of  
27 the agency unless that is required by law other than this [act]. In some states, an employee of the  
28 state attorney general's office will serve as the agency representative presiding on a hearing  
29 related to rulemaking.  
30

**SECTION 307. TIME LIMIT ON ADOPTION, AMENDMENT, OR REPEAL OF  
A RULE.**

(a) An agency may not adopt, amend, or repeal a rule until the public comment period has ended.

(b) Not later than [two years] after the notice of proposed rulemaking, the agency shall adopt, amend, or repeal the rule pursuant to the rulemaking proceeding or terminate the proceeding by publication of a notice of termination in the [administrative bulletin]. [The agency may extend the period of time for adopting, amending or repealing the rule for an additional period of [two years] by filing a statement of good cause for the extension in the rulemaking record, but must provide for additional public participation as provided in Section 306 prior to adopting, amending or repealing the rule.]

(c) An agency shall file rules adopted, amended, or repealed with the [publisher] not later than [ ] days after the date of adoption of the rule.

(d) A rule is void unless it is adopted, amended, or repealed and filed within the time limits set by this section.

### Comment

This section codifies the final adoption and filing for publication requirements for rulemaking that is subject to the procedures provided in Sections 304 through 308 of this Act. Section 702(a) of this act requires that the agency shall file a copy of the adopted amended or repealed rule with the rules review committee at the same time it is filed with the publisher. Subsection (d) provides that a rule that is not properly adopted and filed for publication has no legal effect.

**SECTION 308. VARIANCE BETWEEN PROPOSED AND FINAL ACTION.** An agency may not take action on a rule proposed to be adopted, amended, or repealed that differs from the action proposed in the notice of proposed rulemaking on which the rule is based unless

1 the action is the logical outgrowth of the action proposed in the notice.

## 2 **Comment**

3  
4 This section draws upon provisions from several states. See Mississippi Administrative  
5 Procedure Act, Miss. Code Ann. Section 25-43-3.107 and the Minn. Administrative Procedure  
6 Act, M.S.A. Section 14.05. The variance test adopted by state and federal courts is the logical  
7 outgrowth test. If the adopted rule is the logical outgrowth of the proposed rule, no further  
8 comment period is required. If it is not the logical outgrowth, then a further comment period is  
9 required. Courts utilize several factors to apply the logical outgrowth test including: (1) any  
10 person affected by the adopted rule should have reasonably expected that the published proposed  
11 rule would affect the person's interest; (2) the subject matter of the adopted rule or the issues  
12 determined by that rule are different from the subject matter or issues involved in the published  
13 rule proposed to be adopted; and (3) the effect of the adopted rule differs from the effect of the  
14 rule proposed to be adopted or amended.

15  
16 The following cases discuss and analyze the logical outgrowth test and these factors.  
17 These judicial opinions also convey the wide acceptance and use of the logical outgrowth test in  
18 the states. *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008,  
19 1015 (D.C.Cir.2000); *Arizona [publisher]. Serv. Co. v. EPA*, 211 F.3d 1280, 1300  
20 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994);  
21 *Trustees for Alaska v. Dept. Nat. Resources*, \_\_\_AK\_\_\_, 795 P.2d 805 (1990); *Sullivan v.*  
22 *Evergreen Health Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v.*  
23 *Iowa St. Commerce Comm.* \_\_\_IA\_\_\_, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass'n v.*  
24 *Jorling*, 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid*  
25 *Waste Control Bd.*, 852 S.W.2d 893 (Tenn. App. 1992); *Workers' Comp. Comm. v. Patients*  
26 *Advocate*, 47 Tex. 607, 136 S.W.3d 643 (2004); *Dept. Of [publisher]. Svc. re Small Power*  
27 *Projects*, 161 Vt. 97, 632 A.2d 13 73 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer*  
28 *Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980).

## 29 **SECTION 309. EMERGENCY RULEMAKING; DIRECT FINAL**

### 30 **RULEMAKING.**

31  
32 (a) If an agency finds that an imminent peril to the public health, safety, or welfare,  
33 including the imminent loss of federal funding for an agency program, requires the immediate  
34 adoption, amendment, or repeal of a rule and states in a record its reasons for that finding, the  
35 agency, without prior notice or hearing or upon any abbreviated notice and hearing that it finds  
36 practicable, may adopt, amend, or repeal a rule without complying with Sections 304 through  
37 307. The adoption, amendment, or repeal may be effective for not longer than [180] days

1 [renewable once up to an additional [180] days]. The adoption, amendment, or repeal does not  
2 preclude the adoption or amendment of an identical rule, or the repeal of the rule, under Sections  
3 304 through 308. The agency shall file with the [publisher] a rule adopted, amended, or repealed  
4 under this subsection as soon as practicable given the nature of the emergency, shall publish the  
5 rule on its website, and shall notify persons who have requested notice of rules related to that  
6 subject matter. Nothing in this section prohibits the adoption of a new emergency rule if at the  
7 end of the effective period of the original emergency rule, the agency finds that the imminent  
8 peril to the public health, safety, or welfare still exists.

9 (b) If an agency proposes to adopt, amend, or repeal a rule the adoption, amendment, or  
10 repeal of which is expected to be noncontroversial, it may use the direct final rulemaking process  
11 authorized by this subsection and must comply with Section 304 (a)(1), (2), (3), (5), (b); and  
12 Section 312(1).

13 The rule to be adopted, amended, or repealed must be published in the [administrative  
14 bulletin] along with a statement by the agency that it does not expect the action to be  
15 controversial, and that the rule shall become effective upon publication after 30 days if no  
16 objection is received. If no objection is received, the agency shall publish the rule and the action  
17 becomes final under Section 316(e). If an objection to the use of the direct final rulemaking  
18 process is received from any person within [ ] days of the public notice, the rule shall not become  
19 final. The agency shall file notice of the objection with the [publisher] for publication in the  
20 [administrative bulletin], and may proceed with the rulemaking process under Sections 304  
21 through 308.

## 22 **Comment**

23  
24 This section is taken from the 1961 MSAPA, Section 3(2)(b), and the Virginia  
25 Administrative Procedure Act, Va. Code Ann. Section 2.2-4012.1. Some state courts have

1 indicated that *any* exemption from rulemaking requirements must be strictly construed to be  
2 limited to an emergency or virtual emergency situation.

3  
4 Subsection (a) can be used to adopt program requirements necessary to comply with  
5 federal funding requirements, or to avoid suspension of federal funds for noncompliance with  
6 program requirements. When an emergency rule has the effect of repealing an existing rule, the  
7 impact of the end of the emergency on the repealed rule, whether the repealed rule comes back  
8 into existence, is not governed by the provisions of Section 309(a) but would be governed by law  
9 of this state other than this act, such as the governing statute that delegates rulemaking authority  
10 to the agency that issued the emergency rule.

11  
12 Subsection (b) is based upon a recommendation from the Administrative Conference of  
13 the United States. Direct final rulemaking has been recommended by the Administrative  
14 Conference of the United States [ACUS Recommendation 95-4, 60 Fed. Reg. 43110 (1995)].  
15 The study that provided the basis for the recommendation was prepared by Professor Ron Levin  
16 and has been published [Ronald M. Levin, "Direct Final Rulemaking" 64 George Washington  
17 Law Review 1 (1995)]. [However, recognizing that there may be a few other justifications for  
18 exemption, this section adopts a broader rule for matters that will be noncontroversial. Thus, a  
19 situation where the agency is merely making a stylistic correction or correcting an error that the  
20 agency believes is noncontroversial may be adopted without formal rulemaking procedures. See  
21 the VA Fast-Track Rule provision at Va. Code Ann. Section 2.2-4012.1.]

22  
23 In order to prevent misuse of this procedural device, noncontroversial rule promulgation  
24 requires the consent of elected officials, and may be prevented by the requisite number of  
25 persons filing objections. The public comment period in subsection (b) provides notice of the  
26 noncontroversial rule and the opportunity to object to the adoption of the rule. If an objection to  
27 the direct final rulemaking process is received within the public comment period, the agency  
28 must give notice of the objection and then the agency may proceed with the normal rulemaking  
29 process, including the public comment provisions of Section 306.

## 30 31 **SECTION 310. GUIDANCE DOCUMENTS.**

32 (a) An agency may issue a guidance document without following the procedures set forth  
33 in Sections 304 through 308. A guidance document does not have the force of law.

34 (b) An agency that proposes to rely on a guidance document to the detriment of a person  
35 in any administrative proceeding must afford the person a fair opportunity to contest the legality  
36 or wisdom of positions taken in the document. The agency may not use a guidance document to  
37 foreclose consideration of issues raised in the document.

38 (c) A guidance document may contain binding instructions to agency staff members if at

1 an appropriate stage in the administrative process, the agency's procedures provide affected  
2 persons an adequate opportunity to contest positions taken in the document.

3 (d) If an agency proposes to act in an adjudication at variance with a position expressed  
4 in a guidance document, it shall provide a reasonable explanation for the variance. If an affected  
5 person in an adjudication may have reasonably relied on the agency's position, the explanation  
6 must include a reasonable justification for the agency's conclusion that the need for the variance  
7 outweighs the affected person's reliance interests.

8 (f) An agency shall maintain an index of all of its currently effective guidance  
9 documents, publish the index on its website, make all guidance documents available to the public  
10 as provided in Section 201(l), and file the index with the [publisher] [annually] as required by  
11 Section 201(n). The agency may not rely on a guidance document or cite it as precedent against  
12 any party to a proceeding, unless the guidance document is published on the agency website as  
13 required by Section 201(l).

14 (g) A guidance document may be considered by a presiding officer or final decision  
15 maker in an agency adjudication but it does not bind the presiding officer and the final decision  
16 maker in the exercise of discretion.

17 (h) A person may petition an agency under Section 317 to adopt a rule in place of a  
18 guidance document.

19 (i) A person may petition an agency to revise or repeal a guidance document. Not later  
20 than [60] days after submission of the petition, the agency shall:

21 (1) revise or repeal the guidance document;

22 (2) initiate a proceeding for the purpose of considering a revision or repeal; or

23 (3) deny the petition in a record and state its reasons for the denial.

## Comment

This section seeks to encourage an agency to advise the public of its current opinions, approaches, and likely courses of action by using guidance documents (also commonly known as interpretive rules and policy statements). The section also recognizes agencies' need to promulgate such documents for the guidance of both its employees and the public. Agency law often needs interpretation, and agency discretion needs some channeling. The public needs to know the agency's opinion about the meaning of the law and rules that it administers. Increasing public knowledge and understanding reduces unintentional violations and lowers transaction costs. See Michael Asimow, "California Underground Regulations," 44 Admin. L. Rev. 43 (1992); Peter L. Strauss, "Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element," 53 Admin. L. Rev. 803 (2001). This section strengthens agencies' ability to fulfill these legitimate objectives by excusing them from having to comply with the full range of rulemaking procedures before they may issue these nonbinding statements. At the same time, the section incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public's interest in administrative openness and accountability.

Four states have adopted detailed provisions regulating guidance documents in their administrative procedure acts. See Ariz. Rev. Stat. Ann. §§ 41-1001, 41-1091; Mich. Comp. Laws §§ 24.203, 24.224; Va. Code Ann. § 2.2-4008; Wash. Rev. Code Ann. § 34.05.230. This section draws upon those provisions, and also upon requirements and recommendations issued by federal authorities and the American Bar Association.

Subsection (a) exempts guidance documents from the procedures that are required for issuance of rules. Many states have recognized the need for this type of exemption in their administrative procedure statutes. These states have defined guidance documents—or interpretive rules and policy statements—differently from rules, and have also excused agencies creating them from some or all of the procedural requirements for rulemaking. See Ala. Code § 41-22-3(9)(c) ("memoranda, directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public"); Colo. Rev. Stat. § 24-4-102(15), 24-4-103(1) (exception for interpretive rules or policy statements "which are not meant to be binding as rules"); AMAX, Inc. v. Grand County Bd. of Equalization, 892 P.2d 409, 417 (Colo. Ct. App. 1994) (assessors' manual is interpretive rule); Ga. Code Ann. § 50-13-4 ("Prior to the adoption, amendment, or repeal of any rule, *other than interpretive rules or general statements of policy*, the agency shall [follow notice-and-comment procedure]") (emphasis added); Mich. Comp. Laws § 24.207(h) (defining "rule" to exclude "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory"); Wyo. Stat. Ann. § 16-3-103 ("Prior to an agency's adoption, amendment or repeal of all rules *other than interpretative rules or statements of general policy*, the agency shall . . .") (emphasis added); In re GP, 679 P.2d 976, 996-97 (Wyo. 1984). See also Michael Asimow, "Guidance Documents in the States: Toward a Safe Harbor," 54 Admin. L. Rev. 631 (2002) (estimating that more than thirty states have relaxed rulemaking requirements for agency guidance documents such as interpretive and policy statements). The federal Administrative Procedure Act draws a similar distinction. See 5 U.S.C. § 553(b)(A) (exempting "interpretative rules [and] general statements

1 of policy” from notice-and-comment procedural requirements).

2  
3 The second sentence of subsection (a) sets forth the fundamental proposition that a  
4 guidance document, in contrast to a rule, lacks the force of law. Many state and federal decisions  
5 recognize the distinction. See, e.g., *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533  
6 (D.C. Cir. 1986); *District of Columbia v. Craig*, 930 A.2d 946, 968-69 (D.C. 2007); *Clonlara v.*  
7 *State Bd. of Educ.*, 501 N.W.2d 88, 94 (Mich. 1993); *Penn. Human Relations Comm’n v.*  
8 *Norristown Area School Dist.*, 374 A.2d 671, 678 (Pa. 1977).

9  
10 Subsection (b) requires an agency to allow affected persons to challenge the legality or  
11 wisdom of guidance documents when it seeks to rely on these documents to their detriment. In  
12 effect, this subsection prohibits an agency from treating guidance documents as though they were  
13 rules. Because rules have the force of law (i.e., are binding), an agency need not respond to  
14 criticisms of their legality or wisdom during an adjudicative proceeding; the agency would be  
15 obliged in any event to adhere to them until such time as they have been lawfully rescinded or  
16 invalidated. In contrast, a guidance document is not binding. Therefore, when affected persons  
17 seek to contest a position expressed in a guidance document, the agency may not treat the  
18 document as determinative of the issues raised. See Recommendation 120C of the American Bar  
19 Association, 118-2 A.B.A. Rep. 57, 380 (August 1993) (“When an agency proposes to apply a  
20 nonlegislative rule . . . , it [should] provide affected private parties an opportunity to challenge  
21 the wisdom or legality of the rule [and] not allow the fact that a rule has already been made  
22 available to the public to foreclose consideration of [their] positions”).

23  
24 An integral aspect of a fair opportunity to challenge a guidance document is the agency’s  
25 responsibility to respond reasonably to arguments made against the document. Thus, when  
26 affected persons take issue with propositions expressed in a guidance document, the agency  
27 “must be prepared to support the policy just as if the [guidance document] had never been  
28 issued.” *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974); see *Center for Auto*  
29 *Safety v. NHTSA*, 452 F.3d 798, 807 (D.C. Cir. 2006); *Professionals and Patients for*  
30 *Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995); *American Mining Cong. v.*  
31 *MSHA*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

32  
33 An agency may not, therefore, treat its prior promulgation of a guidance document as a  
34 justification for not responding to arguments against the legality or wisdom of the positions  
35 expressed in such a document. *Flagstaff Broadcasting Found. v. FCC*, 979 F.2d 1566 (D.C. Cir.  
36 1992); *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992); *Giant Food Stores, Inc. v.*  
37 *Commonwealth*, 713 A.2d 177, 180 (Pa. Cmwlth. 1998); Agency Policy Statements,  
38 Recommendation 92-2 of the Admin. Conf. of the U.S. (ACUS), 57 Fed. Reg. 30,103 (1992), ¶  
39 II.B. An agency may, however, refer to a guidance document during a subsequent administrative  
40 proceeding and rely on its reasoning, if it also recognizes that it has leeway to depart from the  
41 positions expressed in the document. See, e.g., *Steeltech, Ltd. v. USEPA*, 273 F.3d 652, 655-56  
42 (6th Cir. 2001) (upholding decision of ALJ who “expressly stated that the [guidance document]  
43 was not a rule and that she had the discretion to depart from [it], if appropriate,” but who adhered  
44 to the document upon determining “that the present case does not present circumstances that  
45 raise policy issues not accounted for in the [document]”); *Panhandle Producers & Royalty*  
46 *Owners Ass’n v. Econ. Reg. Admin.*, 847 F.2d 1168, 1175 (5th Cir. 1988) (agency “responded



1 fully to each argument made by opponents of the order, without merely relying on the force of  
2 the policy statement,” but was not “bound to ignore [it] altogether”); *American Cyanamid Co. v.*  
3 *State Dep’t of Envir. Protection*, 555 A.2d 684, 693 (N.J. Super. 1989) (rejecting contention that  
4 agency had treated a computer model as a rule, because agency afforded opposing party a  
5 meaningful opportunity to challenge the model’s basis and did not apply the model uniformly in  
6 every case). See generally John F. Manning, “Nonlegislative Rules,” 72 *Geo. Wash. L. Rev.*  
7 893, 933-34 (2004); Ronald M. Levin, “Nonlegislative Rules and the Administrative Open  
8 Mind,” 41 *Duke L.J.* 1497 (1992). The relevance of a guidance document to subsequent  
9 administrative proceedings has been compared with that of the agency’s adjudicative precedents.  
10 See subsection (d) *infra*.

11  
12 What constitutes a fair opportunity to contest a policy statement within an agency will  
13 depend on the circumstances. See ACUS Recommendation 92-2, *supra*, ¶ II.B. (“[A]ffected  
14 persons should be afforded a fair opportunity to challenge the legality or wisdom of [a policy  
15 statement] and suggest alternative choices in an agency forum that assures adequate  
16 consideration by responsible agency officials,” preferably “at or before the time the policy  
17 statement is applied to [them]”). Affected persons’ right to a meaningful opportunity to be heard  
18 on the issues addressed in guidance documents must be reconciled with the agency’s interest in  
19 being able to set forth its interpretations and policies for the guidance of agency personnel and  
20 the public without undue impediment. An agency may use its rulemaking authority to set forth  
21 procedures that it believes will provide affected persons with the requisite opportunity to be  
22 heard. To the extent that these procedures survive judicial scrutiny for compliance with the  
23 purposes of this subsection (b), the agency will thereafter be able to rely on established practice  
24 and precedent in determining what hearing rights to afford to persons who may be affected by its  
25 guidance documents. As new fact situations arise, however, courts should be prepared to  
26 entertain contentions that procedures that have been upheld in past cases did not, or will not,  
27 afford a meaningful opportunity to be heard to some persons who may wish to challenge the  
28 legality or wisdom of a particular guidance document.

29  
30 Subsection (c) permits an agency to issue mandatory instructions to agency staff  
31 members, typically those who deal with members of the public at an early stage of the  
32 administrative process, provided that affected persons will have a fair opportunity to contest the  
33 positions taken in the guidance document at a later stage. See Office of Management and  
34 Budget, Final Bulletin for Agency Good Guidance Practices, 72 *Fed. Reg.* 3432 (2007), §  
35 II(2)(h) (significant guidance documents shall not “contain mandatory language . . . unless . . .  
36 the language is addressed to agency staff and will not foreclose agency consideration of positions  
37 advanced by affected private parties”); ACUS Recommendation 92-2, *supra*, ¶ III (an agency  
38 should be able to “mak[e] a policy statement which is authoritative for staff officials in the  
39 interest of administrative uniformity or policy coherence”). For example, an agency manual  
40 might prescribe requirements that are mandatory for low-level staff, leaving to higher-ranking  
41 officials the discretion to depart from the interpretation or policy stated in the manual. The  
42 question of what constitutes an adequate opportunity to be heard may vary among agencies or  
43 programs. In some programs, centralization of discretionary authority may be a necessary  
44 concession to “administrative uniformity or policy coherence”; in other programs, the obligation  
45 to proceed through multiple stages of review might be considered so burdensome as to deprive  
46 members of the public of a meaningful opportunity to obtain agency consideration of whether the

1 guidance document should apply to their particular situations. The touchstone in every case is  
2 whether the opportunity to be heard prescribed by subsection (b) remains realistically available  
3 to affected persons.  
4

5 Subsection (d) is based on a similar provision in ABA Recommendation No. 120C, *supra*.  
6 It is in accord with general principles of administrative law, under which an agency's failure to  
7 reasonably explain its departure from established policies or interpretations renders its action  
8 arbitrary and capricious on judicial review. See § 509(a)(3)(H) [Alternative 2] (court may grant  
9 relief against agency action other than a rule if it is "inconsistent with the agency's prior practice  
10 or precedent, unless the agency has stated credible reasons sufficient to indicate a fair and  
11 rational basis for the inconsistency"); 1981 MSAPA § 5-116(c)(8)(iii) (equivalent provision);  
12 *Yale-New Haven Hospital v. Leavitt*, 470 F.3d 71, 79-80 (2d Cir. 2006). It has been said that a  
13 guidance document should constrain subsequent agency action in the same manner that the  
14 agency's adjudicative precedents do. See Peter L. Strauss, "The Rulemaking Continuum," 41  
15 *Duke L.J.* 1463, 1472-73, 1486 (1992) (cited with approval on this point in *United States v.*  
16 *Mead Corp.*, 533 U.S. 218, 232 (2001)); see also Manning, *supra*, at 934-37. Subsection (d)  
17 refers only to official acts of the agency (compare the definition of "agency action" in Section  
18 102(3)), not to informal acts of agency staff, such as inspections. The latter types of conduct are  
19 frequently not accompanied by a written statement at all, so it would be outside the scope of  
20 requirements imposed by subsection (d) to require these government personnel to "explain" a  
21 departure from the position taken in a guidance document.  
22

23 One purpose of this subsection is to protect the interests of persons who may have  
24 reasonably relied on a guidance document. An agency that acts at variance with its past practices  
25 may be held to have acted in an arbitrary and capricious manner if the unfairness to regulated  
26 persons outweighs the government's interest in applying its new view to those persons. *Heckler*  
27 *v. Community Health Servs.*, 467 U.S. 51, 61 (1984) ("an administrative agency may not apply a  
28 new [case law] rule retroactively when to do so would unduly intrude upon reasonable reliance  
29 interests"); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007); *Epilepsy Found. v.*  
30 *NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001); *Microcomputer Tech. Inst. v. Riley*, 139 F.3d  
31 1044, 1050 (5th Cir. 1998). Accordingly, where persons may have justifiably relied on a  
32 guidance document, the agency's explanation for departing from the position taken in that  
33 document should ordinarily include a reasonable justification for the decision to override their  
34 reliance interests.  
35

36 The first two sentences of subsection (f) are based directly on Va. Code Ann. § 2.2-4008.  
37 Similar provisions have been adopted in Arizona and Washington. See *Ariz. Rev. Stat. Ann.* §  
38 41-1091; *Wash. Rev. Code Ann.* § 34.05.230(3)-(4).  
39

40 The last sentence of the subsection is based on the federal APA. See 5 U.S.C. §  
41 552(a)(2); *Smith v. NTSB*, 981 F.2d 1326 (D.C. Cir. 1993). Subject to harmless error principles,  
42 see § 509(b), a court may invoke the sanction prescribed in this section without necessarily  
43 concluding that the party against whom the document is cited has valid objections to the  
44 substance of the document.  
45

46 Subsection (g) is based on *Wash. Rev. Code Ann.* § 34.05.230(2), which provides for

1 petitions “requesting the conversion of interpretive and policy statements into rules.” However,  
2 it is phrased more generally than the Washington provision, because an agency that receives a  
3 rulemaking petition will not necessarily wish to “convert” the existing guidance document into a  
4 rule without any revision. Knowing that it will now be speaking with the force of law, in a  
5 format that would be more difficult to alter than a guidance document is, the agency might prefer  
6 to adopt a rule that is narrower than, or otherwise differently phrased than, the guidance  
7 document that it would replace. In any event, the agency will, as provided in section 317, need  
8 to explain any rejection of the petition, whether in whole or in part, and such a rejection will be  
9 judicially reviewable to the same extent as other actions taken under that section.

10  
11 Subsection (h) extends the principles of section 317 by allowing interested persons to  
12 petition an agency to revise or repeal an existing guidance document. Thus, while this Act does  
13 not require an agency to obtain the views of the public before issuing a guidance document, this  
14 subsection provides a procedure by which members of the public may bring their views  
15 regarding an existing guidance document to the agency’s attention and request that the agency  
16 take account of those views. This process may be of particular importance to persons who are  
17 indirectly affected by a guidance document (such as persons who stand to benefit from the  
18 underlying regulatory program) but are unlikely to be the targets of an enforcement action in  
19 which they could challenge the legality or wisdom of the document under subsection (b). See  
20 Nina A. Mendelson, “Regulatory Beneficiaries and Informal Agency Policymaking,” 92 Cornell  
21 L. Rev. 397, 438-44 (2007); see also ACUS Recommendation No. 76-5, 41 Fed. Reg. 56,769  
22 (1976) (noting that section 553(e) of the federal APA “allow[s] any person to petition at any time  
23 for the amendment or repeal of . . . an interpretive rule or statement of general policy”).

24  
25 The subsection requires an agency to respond to the petition in [sixty] or fewer days. An  
26 agency that is not prepared to revise or repeal the guidance document within that time period  
27 may initiate a proceeding for the purpose of giving the matter further consideration. This  
28 proceeding can be informal; the notice and comment requirements of Sections 304 through 308  
29 are inapplicable to it, because those sections deal with rules rather than guidance documents.  
30 The agency may, however, voluntarily solicit public comments on issues raised by the petition.  
31 Cf. ACUS Recommendation 76-5, *supra*, ¶ 2. This section does not prescribe a time period  
32 within which the agency must complete the proceeding, but judicial intervention to compel  
33 agency action “unlawfully withheld or unreasonably delayed” may be sought in an appropriate  
34 case. § 501(a). If the agency declines to revise or repeal the guidance document, within the  
35 [sixty] day period or otherwise, it must explain its decision. Denials of petitions under this  
36 subsection, like denials of petitions for rulemaking under section 317, are reviewable for abuse  
37 of discretion, and the agency’s explanation will provide a basis for any judicial review of the  
38 denial.

39 When an agency grants a petition to revise or repeal a guidance document in part, and  
40 denies the petition in part, the agency should explain the partial denial to comply with the  
41 requirements of Section 310(i)(3).

42  
43 **SECTION 311. REQUIRED INFORMATION FOR RULE.** A rule filed by an  
44 agency with the [publisher] under Section 315 must contain the text of the rule adopted,

1 amended, or repealed and be accompanied by a record containing:

2 (1) the date the agency adopted, amended, or repealed the rule;

3 (2) a reference to the specific statutory or other authority authorizing the action;

4 (3) any findings required by any provision of law as a prerequisite to adoption or  
5 effectiveness of the action;

6 (4) the effective date of the action; and

7 (5) the concise explanatory statement required by Section 312.

8 **Comment**  
9

10 Agency action is defined in section 102(4) to include an agency rule or order [(subsection  
11 (4)(a)], and the failure to issue a rule or order [(subsection (4)(b))]. In Section 311(2), (3), and (4),  
12 the term “action” refers to the rulemaking process related to the adoption, amendment or repeal  
13 of a rule. See Section 102(2) definition of adoption of a rule which includes amendment or repeal  
14 of a rule, unless the context clearly indicates otherwise.

15  
16 **SECTION 312. CONCISE EXPLANATORY STATEMENT.** At the time it adopts,  
17 amends, or repeals a rule, an agency shall issue a concise explanatory statement containing:

18 (1) the agency’s reasons for the action, including the agency’s reasons for not accepting  
19 substantial arguments made in testimony and comments; and

20 (2) subject to Section 308, the reasons for any change between the text of the proposed  
21 adopted or amended rule contained in the published notice of the proposed adoption or  
22 amendment of the rule and the text of the rule as finally adopted.

23 (3) The summary of any regulatory analysis prepared under Section 305.

24 **Comment**  
25

26 Many states have adopted the requirement of a concise explanatory statement. Arkansas  
27 (A.C.A. Section 25-15-204) and Colorado (C.R.S.A. Section 24-4-103) have similar provisions.  
28 The federal Administrative Procedure Act uses the identical terms in Section 553 (c) (5 U.S.C.A.  
29 Section 553). This provision also requires the agency to explain why it rejected substantial  
30 arguments made in comments. Such explanation helps to encourage agency consideration of all  
31 substantial arguments and fosters perception of agency action as not arbitrary. Subsection (2)

1 requires a statement of reasons for any substantial change between the text of the proposed rule,  
2 and the text of the adopted rule. Section 308 prohibits adoption of a rule that differs from the  
3 proposed rule unless the adopted rule is the logical outgrowth of the proposed rule. An adopted  
4 rule that contains a substantial change from the proposed rule can be adopted under Section 308  
5 if the logical outgrowth test is satisfied but the agency will have to provide a statement of  
6 reasons under Section 312(2). If the logical outgrowth test is not met, then the rule can not be  
7 adopted under Section 308, and section 312(2) does not apply.

8  
9 Agency action is defined in section 102(4) to include an agency rule or order [(subsection  
10 (4)(a)], and the failure to issue a rule or order [(subsection (4)(b))]. In Section 312(1), the term  
11 “action” refers to the rulemaking process related to the adoption, amendment or repeal of a rule.  
12 See Section 102(2) definition of adoption of a rule which includes amendment or repeal of a rule,  
13 unless the context clearly indicates otherwise.

14  
15 **SECTION 313. INCORPORATION BY REFERENCE.** A rule may incorporate by  
16 reference all or any part of a code, standard, or rule that has been adopted by an agency of the  
17 United States, this state, another state, or by a nationally recognized organization or association,  
18 if:

19 (1) repeating verbatim the text of the code, standard, or rule in the rule would be unduly  
20 cumbersome, expensive, or otherwise inexpedient;

21 (2) the reference in the rule fully identifies the incorporated code, standard, or rule by  
22 citation, place of inspection, and date[, and states whether the rule includes any later  
23 amendments or editions of the incorporated code, standard, or rule];

24 (3) the code, standard, or rule is readily available to the public in written or electronic  
25 form;

26 (4) the rule states where copies of the code, standard, or rule are available for a  
27 reasonable charge from the agency adopting the rule and where copies are available from the  
28 agency of the United States, this state, another state, or the organization or association originally  
29 issuing the code, standard, or rule; and

30 (5) the agency maintains a copy of the code, standard, or rule readily available for public

inspection at the agency office.

#### Comment

Several states have provisions that require the agencies to retain the voluminous technical codes. See, Alabama, Ala.Code 1975 Section 41-22-9; Michigan, M.C.L.A. 24.232; and North Carolina, N.C.G.S.A. § 150B-21.6. To avoid the problems created by those retention provisions, but to assure that these technical codes are available to the public, this section adopts several specific procedures. One protection is to permit incorporating by reference only codes that are readily available from the outside promulgator, and that are of limited public interest as determined by a source outside the agency. See Wisconsin, W.S.A. 227.21. These provisions will guarantee that important material drawn from other sources is available to the public, but that less important material that is freely available elsewhere does not have to be retained. The bracketed language in subsection (2) is based on variations in state law as to whether later amendments to codes are automatically incorporated into the rule, or whether a new rulemaking proceeding would be required to include code amendments. This issue is discussed in Jim Rossi, “Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards,” 46 WMMLR 1343 (2005).

**SECTION 314. COMPLIANCE.** An action taken under this [article], including the adoption, amendment, or repeal of a rule under Section 309, is not valid unless taken in substantial compliance with the procedural requirements of this [article].

#### Comment

This section is a slightly modified form of the 1961 Model State Administrative Procedure Act, section (3)(c). See also section 3-113(a) and section 3-116 of the 1981 Model State Administrative Procedures Act. Section 504(a) governs the timing of judicial review proceedings to contest any rule on the ground of noncompliance with the procedural requirements of this [act]. The scope of challenges permitted under Section 504(a) includes all applicable requirements of article 3 for the type of rule being challenged.

**SECTION 315. FILING OF RULES.** An agency shall file in written and electronic form with the [publisher] each rule it adopts, amends, or repeals, including a rule adopted, amended, or repealed under Section 309. The agency shall file the rule not later than [ ] days after adoption, amendment, or repeal. The [publisher] shall maintain a permanent register of all filed rules and concise explanatory statements. The [publisher] shall affix to each adopted, amended, or repealed rule a certification of the time and date of filing. The [publisher] shall

1 publish the notice of adopted, amended, or repealed rules in the [administrative bulletin]. In  
2 filing an adopted, amended, or repealed rule, each agency shall use a standard form prescribed by  
3 the [publisher].

#### 4 **Comment**

5 This section is based on the 1961 Model State Administrative Procedure Act, Section 4(a)  
6 and its expansion in the 1981 MSAPA, Section 3-114. Section 201(g)(1) provides that the  
7 administrative bulletin must contain newly filed adopted rules. This section provides that the  
8 publisher is responsible for publishing the notice of adopted rules in the administrative bulletin.  
9

#### 10 **SECTION 316. EFFECTIVE DATE OF RULES.**

11 (a) Except as otherwise provided in this section, [unless disapproved by the [rules review  
12 committee] or [withdrawn by the agency under Section 703,] a rule adopted, amended, or  
13 repealed becomes effective [30] days after publication of the rule in the [administrative bulletin]  
14 [on the [publisher]'s Internet website.]

15 (b) The adoption, amendment, or repeal of a rule may become effective on a later date  
16 than that established by subsection (a) if the later date is required by law other than this [act] or  
17 specified in the rule.

18 (c) The adoption, amendment, or repeal of a rule becomes effective immediately upon its  
19 filing with the [publisher] or on any subsequent date earlier than that established by subsection  
20 (a) if it is required to be implemented by a certain date by the federal or [state] constitution, a  
21 statute, or court order.

22 (d) A rule adopted, amended, or repealed using the emergency process under Section  
23 309(a) becomes effective upon action by the agency.

24 (e) A rule adopted, amended, or repealed using the direct final rulemaking process under  
25 Section 309(b) to which no objection is made becomes effective [30] days after the close of the  
26 public comment period unless the agency specifies a later effective date.

1 **Comment**

2 This is a substantially revised version of the 1961 Model State Administrative Procedure  
3 Act, Section 4 (b) & (c) and 1981 Model State Administrative Procedure Act, Section 3-115.  
4 Most of the states have adopted provisions similar to both the 1961 Model State Administrative  
5 Procedure Act and the 1981 Model State Administrative Procedure Act, although they may differ  
6 on specific time periods. Some rules may have retroactive application or effect provided that  
7 there is express statutory authority for the agency to adopt retroactive rules. See *Bowen v.*  
8 *Georgetown University Hospital* 488 U.S. 204 (1988).  
9

10 **SECTION 317. PETITION FOR ADOPTION OF RULE.** Any person may petition  
11 an agency to adopt a rule. Each agency shall prescribe by rule the form of the petition and the  
12 procedure for its submission, consideration, and disposition. Not later than [60] days after  
13 submission of a petition, the agency shall:

- 14 (1) deny the petition in a record and state its reasons for the denial; or  
15 (2) initiate rulemaking proceedings in accordance with this [act].

16 **Comment**

17 This section is substantially similar to the 1961 MSAPA. See also section 3-117 of the  
18 1981 MSAPA. Agency decisions that decline to adopt a rule are judicially reviewable for abuse  
19 of discretion (See *Massachusetts v. EPA* 127 S. Ct. 1438 (2007) (EPA decision to reject  
20 rulemaking petition and therefore not to regulate greenhouse gases associated with global  
21 warming was judicially reviewable and decision was arbitrary and capricious.)). When an agency  
22 grants a rulemaking petition in part, and denies the petition in part, the agency should explain the  
23 partial denial to comply with the requirements of Section 317(1).  
24



1 [ARTICLE] 4

2 ADJUDICATION IN A CONTESTED CASE

3 SECTION 401. WHEN ARTICLE APPLIES; CONTESTED CASES. This [article]

4 applies to an adjudication made by an agency in a contested case.

5 *Legislative Note: For a statute to create a right to an evidentiary hearing, express use of the*  
6 *term “evidentiary hearing” is not necessary in the statute. Statutes often use terms like “appeal”*  
7 *or “proceeding” or “hearing”, but in context it is clear that they mean an evidentiary hearing.*  
8 *An evidentiary hearing is one in which the resolution of the dispute involves particular facts and*  
9 *the presiding officer is limited to material in the record in making his decision. Hearing rights*  
10 *are created by statutes that establish an agency and delegate powers to the agency (agency*  
11 *enabling acts). The provisions of this [act] do not create hearing rights.*  
12

13 Comment

14  
15 Article 4 of this Act does not apply to all adjudications but only to those adjudications,  
16 defined in Section 102(6) as a “contested case.” Contested case is the definition of the subset of  
17 adjudications that fall within this section because law as defined in Section 102(16) requires an  
18 evidentiary hearing to resolve particular facts or the application of law to facts. This section is  
19 subject to the exception in Section 407 for an emergency hearing if the requirements for that  
20 exception under this Article apply. If the requirements for an emergency adjudication under  
21 Section 407 are met, a hearing in a contested case may be conducted following the procedures in  
22 that section. All contested cases are also subject to Section 402 of this article.  
23

24 Hearings that are required by procedural due process guarantees serve to protect life,  
25 liberty and property *interests*, which arise where a statute creates a justified expectation or  
26 legitimate entitlement. This section includes more than what were described as “rights” under  
27 older common law. In cases where the right to an evidentiary hearing is created by due process,  
28 attention is directed to Article 4A, section 401A which may permit an informal hearing.  
29

30 Section 401, governing contested case hearings, does not apply to investigatory hearings,  
31 a hearing that merely seeks public input or comment, pure administrative process proceedings  
32 such as tests, elections, or inspections, and situations in which a party has a right to a de novo  
33 administrative or judicial hearing. An agency may by rule make all or part of article 4 applicable  
34 to adjudication that does not fall within the requirements of Section 401, including hearing rights  
35 conferred by agency regulations, or on the record appeals.  
36

37 This section draws upon the California, (see Cal. Cal.Gov.Code Section 11410.10);  
38 Minnesota, (see Minnesota Statutes Annotated, Section 14.02, subd. 3; Washington (see Revised  
39 Code of Washington, 34.05.413(2) and Kansas (see Kansas Stat. Ann., KS ST Section 77-502(d)  
40 & Kansas Stat. Ann., KS ST Section 77-503).  
41

1           **SECTION 402. PRESIDING OFFICERS.**

2           (a) A presiding officer must be the individual who is the agency head, a member of a  
3 multi-member body of individuals that is the agency head, an individual designated by the  
4 agency head, unless prohibited by law other than this [act], or an administrative law judge  
5 assigned in accordance with Section 602.

6           (b) An individual who has served as investigator, prosecutor, or advocate at any stage in  
7 a contested case may not serve as the presiding officer or assist or advise the presiding officer in  
8 the case. An individual who is subject to the authority, direction, or discretion of an individual  
9 who has served as [investigator,] prosecutor[,] [or] advocate at any stage in a contested case,  
10 including investigation, may not serve as the presiding officer or assist or advise the presiding  
11 officer in the same proceeding.

12          (c) Subsection (b) also governs separation of functions as to the agency head or other  
13 person or body to which the power to hear or decide the proceeding is delegated.

14          (d) A presiding officer is subject to disqualification for bias, prejudice, financial interest,  
15 ex parte communications as provided in Section 408(h), or any other factor that provides  
16 reasonable doubt about the impartiality of the presiding officer. A presiding officer, after  
17 making a reasonable inquiry, shall disclose to all parties any known facts related to grounds for  
18 disqualification that would be material to the impartiality of the presiding officer in the contested  
19 case proceeding.

20          (e) Any party may petition for the disqualification of a presiding officer promptly after  
21 notice that the person will preside or, if later, promptly upon discovering facts establishing a  
22 ground for disqualification. The petition must state with particularity the ground upon which it is  
23 claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of

1 practice or ethics that requires disqualification. The petition may be denied if the party fails to  
2 exercise due diligence in requesting disqualification after discovering a ground for  
3 disqualification.

4 (f) A presiding officer whose disqualification is requested shall determine whether to  
5 grant the petition and state facts and reasons for the determination in writing. A presiding  
6 officer's decision to deny disqualification is not subject to interlocutory judicial review.

7 (g) If a substitute presiding officer is required, the substitute must be appointed [as  
8 required by law, or if no law governs,] by:

9 (1) the Governor, if the original presiding officer is an elected official; or

10 (2) the appointing authority, if the original presiding officer is an appointed  
11 official.

12 (h) If participation of the agency head is necessary to enable the agency to take action,  
13 the agency head may continue to participate notwithstanding a ground for disqualification or  
14 exclusion.

15 ***Legislative Note:*** *The last alternative under subsection (a) would be applicable in states that*  
16 *have adopted central panel hearing offices but would not apply to states that do not have central*  
17 *panel hearing offices. Article 6 governs central panel hearing offices under this act.*

#### 18 **Comment**

19  
20  
21 Subsection (a) governs who may be appointed to serve as a presiding officer in a disputed  
22 case. If the case is heard by more than one presiding officer, as when the agency head hears a  
23 disputed case en banc, one member of the agency head may serve as chair, but all of the persons  
24 sitting as judge in the case are collectively the presiding officer.

25  
26 Subsection (a) confers a limited amount of discretion upon the agency head to determine  
27 who will preside. The presiding officer may be either the agency head, or one or more members  
28 of the agency head, or one or more administrative law judges assigned by the Office of  
29 Administrative Hearings in accordance with Section 603. Without the bracketed language,  
30 subsection (a) resembles the law in a group of states that have created a central panel of  
31 administrative law judges, and have made the use of administrative law judges from the central  
32 panel mandatory unless the agency head or one or more members of the agency head presides. In

1 some states, however, the use of central panel administrative law judges is mandatory only in  
2 certain enumerated agencies or types of proceedings. If the bracketed language is adopted, the  
3 agency head, in addition to the preceding options for appointment and unless prohibited by law,  
4 may designate any one or more “other persons” to serve as presiding officer. This discretion is  
5 subject to subsections (c) & (d) on separation of functions. This discretion is also limited by the  
6 phrase “unless prohibited by law,” included in the bracketed language, which prevents the use of  
7 “other persons” as presiding officers to the extent that the other state law prohibits their use.  
8 Thus, if this language is adopted by a state that has an existing central panel of administrative  
9 law judges whose use is mandatory in enumerated types of proceedings, the agencies must  
10 continue to use the central panel for those proceedings, but may exercise their option to use  
11 “other persons” for other types of proceedings.

12  
13 Subsection (e) is based on California Government Code Section 11425.30.

14  
15 Subsection (f) is based upon 1981 MSAPA Section 4-202(b). See also California  
16 Government Code Section 11425.40(a). Disclosure duties under subsection (e) are based on state  
17 ethics codes governing ethical standards for judges in the judicial branch of the government,  
18 Section 12 of the 2000 Uniform Arbitration Act, and on state law governing the ethical  
19 responsibilities of government officials and employees. See Section 410.

20  
21 Subsection (g) is based on 1981 MSAPA Section 4-202(c).

22  
23 Subsection (j) is based on California Government Code Section 11425.40(c).

24  
25 Subsection (k) adopts the rule of necessity for decision makers. See California  
26 Government Code Section 11512(c) (agency member not disqualified if loss of a quorum would  
27 result); *United States v. Will* (1980) 449 U.S. 200 (common law rule of necessity applied to U.S.  
28 Supreme Court to decide issues before the court relating to compensation all Article III judges).  
29 Section 408(g) precludes ex parte communications between presiding officers and agency heads.

### 30 31 **SECTION 403. CONTESTED CASE PROCEDURE.**

32 (a) This section does not apply to emergency adjudications.

33 (b) An agency shall make available to the person to which an agency action is directed a  
34 copy of the agency procedures governing the case.

35 (c) In a contested case, the presiding officer shall give all parties a timely opportunity to  
36 file pleadings, motions, and objections. The presiding officer may give all parties the opportunity  
37 to file briefs, proposed findings of fact and conclusions of law, and recommended, interim, or  
38 final orders. The presiding officer, with the consent of all parties, may refer the parties in a

1 contested case proceeding to mediation or other dispute resolution procedure.

2 (d) In a contested case, to the extent necessary for full disclosure of all relevant facts and  
3 issues, the presiding officer shall afford to all parties the opportunity to respond, present  
4 evidence and argument, conduct cross-examination, and submit rebuttal evidence.

5 (e) Except as otherwise provided by law other than this [act], when compelling  
6 circumstances make the appearance of witnesses impracticable and the credibility of testimony  
7 can otherwise be determined, the presiding officer may conduct all or part of an evidentiary  
8 hearing or a prehearing conference by telephone, television, video conference, or other electronic  
9 means. Each party to the proceeding must be given an opportunity to attend, hear, speak, and be  
10 heard at the proceeding as it occurs. Nothing in this subsection prevents an agency from  
11 providing for telephone hearings by rule.

12 (f) Except as otherwise provided in subsection (g), a hearing in a contested case must be  
13 open to the public. A hearing conducted by telephone, television, video conference, or other  
14 electronic means is open to the public if members of the public have an opportunity to attend the  
15 hearing at the place where the presiding officer is located or they have an opportunity to hear or  
16 see the proceeding as it occurs, unless prohibited by law other than this act.

17 (g) A presiding officer may close a hearing on a ground on which this state may close a  
18 judicial proceeding or pursuant to a statute other than this [act].

19 (h) Unless prohibited by law other than this [act], a party, at the party's expense, may be  
20 represented by a lawyer.

21 (i) A party may exercise the right to self representation in a contested case, and the  
22 presiding officer may explain contested case procedures to the self represented party.

23 (j) A presiding officer must record the hearing to provide a transcript of the hearing. The

transcript of the hearing may be recorded by stenographic reporter, video recording, audio recording, or other means.

(k) The decision in a contested case must be written, based on the hearing record, and include a statement of the factual and legal bases of the decision.

(l) Subject to Section 204, the rules by which an agency conducts a contested case may include provisions more protective of the rights of the person to which the agency action is directed than the requirements of this section.

### **Comment**

This section specifies the minimum hearing requirements that must be met in disputed cases under this act. This section applies to all agencies whether or not an agency rule provides for a different procedure; this procedure is excused only if a statute expressly provides otherwise. This section does not prevent an agency from adopting more stringent procedures than those in this section. This section does not supersede conflicting state or federal statutes.

There are several interrelated purposes for this procedural provision: 1) to create a minimum fair hearing procedure; and 2) to attempt to make that minimum procedure applicable to all agencies. In many states, individual agencies have lobbied the legislature to remove various requirements of the state Administrative Procedure Act from them. The result in a considerable number of states is a multitude of divergent agency procedures. This lack of procedural uniformity creates problems for litigants, the bar and the reviewing courts. This section attempts to provide a minimum, universally applicable procedure in all disputed cases. The important goal of this section is to protect citizens by a guarantee of minimum fair procedural protections. The procedures required here are only for actions that fit the definition of a disputed case and fall within the provisions of Section 401. Thus, they do not spread quasi judicial procedures widely, and do not create any significant agency loss of efficiency or increased cost.

This section is modeled in part on the Arizona Regulatory Bill of Rights, see A.R.S. Section 41-1001.01 and the California Administrative Adjudication Bill of Rights, see West Ann.Cal.Gov.Code Section 11425.10.

Under subsection (c), agency procedures governing the case refers to rules of practice adopted under Section 202, or default procedural rules adopted under Section 204, or procedures required under the agency governing statute.

Under subsection (d)(1) evidence is unduly repetitious if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. In most states a presiding officer's determination that evidence is unduly repetitious may be overturned only for abuse of discretion. Under subsection (d)(1), the legal

1 residuum rule is not adopted and hearsay evidence can be sufficient to support fact findings if the  
2 hearsay evidence is sufficiently reliable. This provision is based on the federal A.P.A. provision,  
3 5 U.S.C. Section 556 (d), Richardson v. Perales, (1971) 402 U.S. 389 and the 1981 MSAPA  
4 Section 4-215(d). (reasonably prudent person standard for reliability).

5  
6 Subsection (d)(4) information that is not a public record means information not subject to  
7 disclosure under the applicable public records act in the jurisdiction.

8  
9 Subsection (d)(5) is based on 1981 MSAPA Section 4-212(f). See also California  
10 Government Code Section 11515, and 1961 MSAPA Section 10(4).

11  
12 Subsection (d)(6) is based on 1981 MSAPA Section 4-215(d). See also California  
13 Government Code Section 11425.50(c) which contains the same language.

14  
15 Under subsection (g) hearings in contested cases can be conducted using the telephone,  
16 television, video conferences, or other electronic means. Subsection (g) is based in part on  
17 California Government Code Section 11440.30. Due process of law may require live in person  
18 hearings. See Whiteside v. State, (2001) 20 P. 3d 1130 (Supreme Court of Alaska) (due process  
19 of law violated with telephone hearing in driver's license revocation hearing when driver's  
20 credibility was material to the hearing, and the driver was not offered an in person hearing); But  
21 see Bancroft v. Employment Division (1985) 72 Or. App. 486, 696 P. 2d 19, 21 (telephone  
22 hearings do not violate due process of law in hearings in which the credibility of a party is at  
23 issue because audible indicia of a witness's demeanor are sufficient for credibility).

24  
25 Subsection (k) provides for a right of self representation for parties in contested case  
26 proceedings. Subsection (k) also allows presiding officers to accommodate pro se litigant's  
27 unfamiliarity with agency procedures in contested cases by explaining those procedures to the  
28 pro se litigant to the extent consistent with fair hearing and impartial decision maker  
29 requirements. Goldberg v. Kelley (1970) 397 U.S. 254 (impartial decision-making is essential to  
30 due process of law). The fair hearing limits would be exceeded if the presiding officer violated  
31 impartial decision maker requirements by improperly assisting one party in presenting that  
32 parties case at the hearing.

33  
34 The subsection (l) written decision requirement is based in part on 1961 MSAPA Section  
35 12, and on 1981 MSAPA Section 4-215(g). See also California Government Code Section  
36 11425.50. See also sections 801, and 802, electronic publication of written decisions, and the  
37 provisions of 15 U.S.C. Section 7004.

38  
39 Section 10 of the 1961 MSAPA contained many similar provisions.

40  
41 **SECTION 404. EVIDENCE IN CONTESTED CASE.** The following rules apply in  
42 contested cases:

43 (1) Except as otherwise provided by law, when the agency initiates the adjudicative

1 proceeding, the agency has the burden of proof. When a party other than the agency initiates the  
2 adjudicative proceeding, that party has the burden of proof.

3 (2) Upon proper objection, the presiding officer shall exclude evidence that is irrelevant,  
4 immaterial, unduly repetitious, excludable on constitutional or statutory grounds, or excludable  
5 on the basis of an evidentiary privilege recognized in the courts of this state. Any other relevant  
6 evidence may be received if it is of a type commonly relied upon by reasonably prudent  
7 individuals in the conduct of their affairs. The presiding officer may exclude evidence that is  
8 objectionable under the applicable rules of evidence, but evidence may not be excluded solely  
9 because it is hearsay.

10 (3)

#### 11 **Alternative A**

12 Hearsay evidence may be used to supplement or explain other evidence, but on timely objection,  
13 is not sufficient by itself to support a finding unless it would be admissible over objection in a  
14 civil action.

#### 15 **Alternative B**

16 Hearsay evidence is sufficient to support fact findings if it constitutes reliable, probative, and  
17 substantial evidence.

#### 18 **End of Alternatives**

19 (4) An objection must be made at the time the evidence is offered. In the absence of an  
20 objection, the presiding officer may exclude evidence at the time it is offered. A party may make  
21 an offer of proof when evidence is objected to or before the presiding officer's decision to  
22 exclude evidence.

23 (5) Evidence may be received in written form if doing so will expedite the hearing



1 without substantial prejudice to a party. Documentary evidence may be received in the form of  
2 copies or excerpts or by incorporation by reference.

3 (6) Testimony must be made under oath or affirmation.

4 (7) Evidence must be made part of the hearing record of the case. Information or  
5 evidence may not be considered in determining the case unless it is part of the hearing record. If  
6 the hearing record contains information that is confidential, the presiding officer may conduct a  
7 closed hearing to discuss the information, issue necessary protective orders, and seal all or part  
8 of the hearing record.

9 (8) The presiding officer may take official notice of all facts of which judicial notice may  
10 be taken and of other scientific and technical facts within the specialized knowledge of the  
11 agency. Parties must be notified at the earliest practicable time of the facts proposed to be  
12 noticed and their source, including any staff memoranda or data. The parties must be afforded an  
13 opportunity to contest any officially noticed facts before the decision is announced.

14 (9) The experience, technical competence, and specialized knowledge of the presiding  
15 officer may be used in the evaluation of the evidence in the hearing record.

16 **SECTION 405. NOTICE IN CONTESTED CASE.**

17 (a) Except as otherwise provided for an emergency adjudication under Section 408, an  
18 agency shall give notice as provided in this section.

19 (b) In an action initiated by a person other than an agency, within a reasonable time after  
20 filing, the agency shall give notice to all parties that an action has been commenced. The notice  
21 must include:

22 (1) the official file or other reference number, the name of the proceeding, and a  
23 general description of the subject matter;

1 (2) contact information for communicating with the agency, including the agency  
2 mailing address and telephone number;

3 (3) a statement of the time, place, and nature of the prehearing conference or  
4 hearing, if any;

5 (4) the name, official title, mailing address, and telephone number of any attorney  
6 or employee who has been designated to represent the agency; and

7 (5) that the person has the right to be represented by a lawyer as provided in  
8 Section 403(h).

9 (c) In an action initiated by the agency, the agency must give an initial notice to the party  
10 against which the action is brought. The notice shall include:

11 (1) notification that an action that may result in an order has been commenced  
12 against the party;

13 (2) a short and plain statement of the matters asserted, including the issues  
14 involved;

15 (3) a statement of the legal authority under which the hearing is held citing the  
16 statutes and any rules involved;

17 (4) the official file or other reference number and the name of the proceeding;

18 (5) the name, official title, mailing address, [e-mail address,] [facsimile number,]  
19 and telephone number of the presiding officer or, if no officer has been appointed at the time the  
20 notice is given, the name, official title, mailing address, [e-mail address,] [facsimile address,] and  
21 telephone number of the agency's representative;

22 (6) a statement that a party that fails to attend or participate in any subsequent  
23 proceeding in a contested case may be held in default;

1 (7) a statement that the party served may request a hearing and instructions in  
2 plain language about how to request a hearing; and

3 (8) the names and last known addresses of all parties and other persons to which  
4 notice is being given by the agency.

5 (d) When a hearing or a prehearing conference is scheduled, the agency shall give parties  
6 notice that contains the information required by subsection (c) at least 14 days before the hearing  
7 or prehearing conference.

8 (e) Notice may include other matters that the presiding officer considers desirable to  
9 expedite the proceedings.

#### 10 **Comment**

11  
12 This section is taken from: the 1961 Model State Administrative Procedure Act, section 9  
13 and the 1981 Model State Administrative Procedure Act, Section 4-206. See also; Oregon,  
14 O.R.S. Section 183.415; Kansas, K.S.A. Section 77-518; Iowa, I.C.A. Section 17A.12; Montana,  
15 MCA 2-4-601; and Michigan, M.C.L.A. 24.271.

#### 16 **SECTION 406. HEARING RECORD IN CONTESTED CASE.**

17  
18 (a) An agency shall maintain a hearing record in each contested case.

19 (b) The hearing record must contain:

20 (1) a recording of the proceeding;

21 (2) notices of all proceedings;

22 (3) any pre-hearing order;

23 (4) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

24 (5) evidence admitted, received, or considered;

25 (6) a statement of matters officially noticed;

26 (7) proffers of proof and objections and rulings thereon;

27 (8) proposed findings, requested orders, and exceptions;

- 1 (9) any transcript of all or part of the hearing;
- 2 (10) any final order, recommended decision, or order on reconsideration; and
- 3 (11) matters placed on the record after an ex parte communication under Section
- 4 408(e).

5 (c) The hearing record constitutes the exclusive basis for agency action in a contested

6 case.

7 **Comment**

8

9 The recording of an agency hearing can be made by certified shorthand reporter, video or

10 audio recording, or other electronic means. Judicial review under Section 507 is limited to

11 matters in the agency hearing record.

12

13 **SECTION 407. EMERGENCY ADJUDICATION PROCEDURE.**

14 (a) Unless prohibited by law other than this [act], an agency may conduct an emergency

15 adjudication in a contested case under this section.

16 (b) An agency may take action and issue an order under this section only to deal with an

17 imminent peril to the public health, safety, or welfare.

18 (c) Before issuing an order under this section, an agency, if practicable, shall give notice

19 and an opportunity to be heard to the person to which the agency action is directed. The notice

20 and hearing may be oral or written and may be communicated by telephone, facsimile, or other

21 electronic means.

22 (d) An order issued under this section must briefly explain the factual and legal reasons

23 for making the decision using emergency adjudication procedures.

24 (e) To the extent practicable, an agency shall give notice of an order to the person to

25 which the agency action is directed. The order is effective when signed by the agency head or

26 the designee of the agency head.

1 (f) After issuing an order pursuant to this section, an agency shall proceed as soon as  
2 practicable to provide notice and an opportunity for a hearing following the procedure under  
3 Section 403 to determine the issues underlying the temporary order.

4 (g) The emergency order is effective for 180 days, or until the effective date of an order  
5 issued under the contested case procedures of Section 403, whichever is shorter.

#### 6 **Comment**

7  
8 This section is based upon the 1961 Model State Administrative Procedure Act, section  
9 14(c) and the 1981 Model State Administrative Procedure Act, Section 4-501. The procedure of  
10 this section is intended permit immediate agency emergency adjudication, but also to provide  
11 minimal protections to parties against whom such action is taken. Emergencies regularly occur  
12 that immediately threaten public health, safety or welfare: licensed health professionals may  
13 endanger the public; developers may act rapidly in violation of law; or restaurants may create a  
14 public health hazard. In these cases the agencies must possess the power to act rapidly to curb  
15 the threat to the public. On the other hand, when the agency acts in such a situation, there should  
16 be some modicum of fairness, and the standards for invoking this remedy must be clear, so that  
17 the emergency label may be used only in situations where it fairly can be asserted that rapid  
18 action is necessary to protect the public.

19  
20 Federal and state case law have held that in an emergency situation an agency may act  
21 rapidly and postpone any formal hearing without violation, respectively, of federal or state  
22 constitutional law. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Gilbert v. Homar* (1997) 520 U.S.  
23 924; *Dep't of Agric. v. Yanes*, 755 P.2d 611 (OK. 1987).

24  
25 The generic provision in this section has several advantages over the present divergent  
26 approaches to emergency agency action. First, all agencies have the needed power to act without  
27 delay, but there is provision for some type of brief hearing, if feasible. Second, this article limits  
28 the agency to action of this type only in a genuine, defined emergency. Third, there are pre and  
29 post deprivation protections. This section seeks to strike an appropriate balance between public  
30 need and private fairness.

31  
32 This section does not apply to an emergency adjudication, cease and desist order, or other  
33 action in the nature of emergency relief issued pursuant to express statutory authority arising  
34 outside of this act.

#### 35 **SECTION 408. EX PARTE COMMUNICATIONS.**

36  
37 (a) For purposes of this section, "final decision maker" means the agency head or another  
38 person or body to which the power to decide the proceeding is delegated.

1 (b) Except as otherwise provided in subsections (c) and (d), or unless required for the  
2 disposition of ex parte matters authorized by statute, while a contested case is pending, the  
3 presiding officer and the final decision maker may not make to or receive from any person any  
4 communication concerning a pending contested case other than uncontested procedural issues  
5 without notice and opportunity for all parties to participate in the communication. For the  
6 purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or  
7 from an application for an agency decision, whichever is earlier.

8 (c) A presiding officer and the final decision maker may communicate with an individual  
9 authorized by law to provide legal advice to the presiding officer or to the final decision maker  
10 and may communicate on ministerial matters with an individual who serves on the  
11 [administrative] [personal] staff of the presiding officer or the staff of the final decision maker if  
12 the person providing legal advice or ministerial information has not served as investigator,  
13 prosecutor, or advocate at any stage of the proceeding, and if the individual does not furnish,  
14 augment, diminish, or modify the evidence in the record.

15 (d) An employee or representative of an agency may communicate with the agency head  
16 who is the presiding officer or final decision maker in a pending contested case about that case  
17 if:

18 (1) the employee or representative:

19 (A) has not served as an investigator, prosecutor, or advocate at any stage  
20 of the contested case, and has not communicated with any such person about the case; and

21 (B) has not otherwise made or received communications about the case  
22 that the agency head is prohibited from making or receiving; and

1 (2) the communication does not furnish, augment, diminish, or modify the  
2 evidence in the agency hearing record and is:

3 (A) an explanation of the technical or scientific basis of, or technical or  
4 scientific terms in, the evidence in the agency hearing record;

5 (B) an explanation of the precedent, policies, or procedures of the agency;  
6 or

7 (C) any other communication that does not address the quality or  
8 sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the  
9 credibility of witnesses.

10 (e) If a presiding officer or the final decision maker makes or receives a communication  
11 in violation of this section, the presiding officer or the final decision maker, if the  
12 communication is:

13 (1) written, shall make the communication a part of the hearing record and  
14 prepare and make part of the record a memorandum that contains the response of the presiding  
15 officer and the final decision maker to the communication and the identity of the party or person  
16 that communicated; or

17 (2) oral, shall prepare a memorandum that contains the substance of the verbal  
18 communication, the response of the presiding officer and the final decision maker, and the  
19 identity of the party or person that communicated.

20 (f) If a communication prohibited by this section is made, the presiding officer or the  
21 final decision maker shall notify all parties of the prohibited communication and permit parties to  
22 respond in writing within 15 days after the notice. Upon good cause shown, the presiding officer  
23 or the final decision maker may permit additional testimony in response to the prohibited

1 communication.

2 (g) If a presiding officer is a member of a multi-member body of individuals that is the  
3 agency head, the presiding officer may communicate with the other members of the multi  
4 member body. Otherwise, while a proceeding is pending, there may be no communication, direct  
5 or indirect, regarding any issue in the proceeding between the presiding officer and the agency  
6 head or other person or body to which the power to hear or decide the proceeding is delegated.

7 (h) If necessary to eliminate the effect of a communication received in violation of this  
8 section, a presiding officer and final decision maker may be disqualified under Section 402 (d)  
9 and (e), the parts of the record pertaining to the communication may be sealed by protective  
10 order, or other appropriate relief may be granted, including an adverse ruling on the merits of the  
11 case or dismissal of the application.

#### 12 **Comment**

13  
14 This section is not intended to be applied to communications made by or to a presiding  
15 officer or personal staff assistant regarding noncontroversial practice and procedure matters such  
16 as number of pleadings, number of copies or type of service. Communications related to  
17 contested procedural issues or motions are covered by Section 409(a). Other communications not  
18 on the merits but related to security or to the credibility of a party or witness are covered by  
19 Section 409(a). See *Matthew Zaheri Corp., Inc. v. New Motor Vehicle Board* (1997) 55 Cal.  
20 App. 4<sup>th</sup> 1305. However, this section goes further in permitting advice to the presiding officer  
21 from staff members on complex technical and scientific matters, but permits parties to reply to  
22 those staff communications.

23  
24 This section also provides another remedy besides disclosure and party reply. In a case  
25 where disclosure and reply are inadequate to cure or eliminate the effect of the ex parte contact, a  
26 protective order may be issued. The intent of authorizing the protective order is to keep the ex  
27 parte material from the successor presiding officer.

28  
29 This section draws in part from the systematic California provisions on ex parte contacts.  
30 See West's Ann.Cal.Gov.Code Section 11430.10 to 11430.80. The California sections address  
31 many of the problems that arise in this area, and attempt to distinguish technical, advisory  
32 contacts from agency staff to presiding officers or agency heads from other kinds of party  
33 contacts.



1           **SECTION 409. INTERVENTION.**

2  
3           (a) A presiding officer shall grant a timely petition for intervention in a contested case if:

4                   (1) the petitioner has a statutory right under law other than this act to initiate or to  
5 intervene in the proceeding in which intervention is sought; or

6                   (2) the petitioner has an interest that may be adversely affected by the outcome of  
7 the proceeding and that interest is not adequately represented by existing parties.

8           (b) A presiding officer may grant a timely petition for intervention if the petitioner has a  
9 permissive statutory right under law other than this act to intervene or if the petitioner's claim or  
10 defense is based on the same transaction or occurrence as the contested case.

11           (c) A presiding officer may impose conditions at any time upon the intervener's  
12 participation in the proceedings.

13           (d) A presiding officer may permit intervention provisionally and, at any time later in the  
14 proceedings or at the end of the proceedings, may revoke the provisional intervention.

15           (e) Upon request by the interveners or existing parties or by action of the presiding  
16 officer, the presiding officer may hold a hearing on the intervention petition.

17           (f) A presiding officer shall promptly give notice of an order granting, denying, or  
18 revoking intervention to the petitioner for intervention and to all parties. The notice must be  
19 given at a reasonable time to allow parties to reasonably prepare for the hearing on the merits.

20                                   **Comment**

21  
22           Section 408 is based in part of 1981 MSAPA Section 4-209. See also Federal Rule of  
23 Civil Procedure Rule 24 (intervention of right under Rule 24(a), and permissive intervention  
24 under Rule 24(b)).

25  
26           Subsection (c) recognizes the normal judicial practice of limiting the participation of  
27 intervenors, especially on cross examination, to their particular interest and taking any other  
28 procedural steps or limitations in order to maintaining an orderly and expeditious hearing.  
29 Mandatory intervention is provided for in subsections (a)(1), and (2). Permissive intervention is

1 provided for in subsection (b). Subsection (d) recognizes the power of the presiding officer to  
2 dismiss a party who has intervened at any time after intervention has occurred when it appears  
3 that the conditions of this section or the requirements for the intervening party's standing have  
4 not been satisfied. Subsection (f) provides for notice suitable under the circumstances to enable  
5 parties to anticipate and prepare for changes that may be caused by the intervention.  
6

#### 7 **SECTION 410. SUBPOENAS.**

8 (a) Upon a request in a record by a party in a contested case, the presiding officer or any  
9 other officer to whom the power is delegated shall issue a subpoena for the attendance of a  
10 witness and the production of books, records, and other evidence upon a showing of general  
11 relevance and reasonable scope of the evidence sought for use at the hearing.

12 (b) Unless otherwise provided by law or agency rule, a subpoenas issued under  
13 subsection (a) shall be served and, upon application to the court by a party or the agency,  
14 enforced in the manner provided by law for the service and enforcement of subpoenas in a civil  
15 action.

#### 16 **Comment**

17 Section 409 is based in part on 1981 MSAPA Section 4-210. See also California  
18 Government Code sections 11450.05 to 11450.50 (subpoenas in administrative adjudication).  
19

20 Subsection (b) is based on Arizona administrative procedure act Section 41-1062A.4.  
21

#### 22 **SECTION 411. DISCOVERY.**

23 (a) In this section, "statement" includes a record of a person's written statement signed  
24 by a person and a record that summarizes an oral statement made by a person.

25 (b) Except in an emergency hearing under Section 408, a party, upon written notice to  
26 another party at least [ ] days before an evidentiary hearing, may:

27 (1) obtain the names and addresses of witnesses the disclosing party will present  
28 at the hearing to the extent known to the other party; and

29 (2) inspect and copy any of the following material in the possession, custody, or

1 control of the other party:

2 (A) statements of parties and witnesses then proposed to be called;

3 (B) all records, including reports of mental, physical, and blood  
4 examinations, and other evidence the party proposes to offer;

5 (C) investigative reports made by or on behalf of the agency or other  
6 party pertaining to the subject matter of the adjudication;

7 (D) statements of expert witnesses proposed to be called;

8 (E) any exculpatory material in the possession of the agency; or

9 (F) other materials for good cause shown.

10 (3) Parties to a contested case proceeding have a duty to supplement responses  
11 provided under subsection (b) to include information thereafter acquired to the extent that  
12 information will be relied upon in the hearing.

13 (c) Upon petition, a presiding officer may issue a protective order for any material for  
14 which discovery is sought under this section that is exempt, privileged, or otherwise made  
15 confidential or protected from disclosure by law, including material subject to the attorney-client  
16 privilege, attorney work product, and [executive] [deliberative process] privilege, and material  
17 the disclosure of which would result in annoyance, embarrassment, oppression, or undue burden  
18 or expense to any person or party.

19 (d) Upon petition, the presiding officer may issue an order compelling discovery for  
20 refusal to comply with a discovery request unless good cause exists for refusal. Failure to  
21 comply with the discovery order may be enforced according to the rules of civil procedure.

22 (e) Upon petition and for good cause shown, the presiding officer may issue an order  
23 authorizing discovery by other methods provided by law other than this [act].

1 **Comment**

2  
3 Discovery in administrative adjudication is more limited than in civil court proceedings.  
4 Nevertheless discovery is available for the items listed in subsection (b). See California  
5 Government Code Section 11507.6 to 11507.7 (discovery in administrative adjudication).  
6

7 Section 410 is based on Section 11507.6. 1981 MSAPA Section 4-210 also provides for  
8 discovery in administrative proceedings.  
9

10 **SECTION 412. DEFAULT.**

11 (a) Unless otherwise provided by law other than this [act], if a party without good cause  
12 fails to attend or participate in a prehearing conference or hearing in a contested case, the  
13 presiding officer may issue a default order. If a default order is issued, the presiding officer may  
14 conduct any further proceedings necessary to complete the adjudication without the defaulting  
15 party and shall determine all issues in the adjudication, including those affecting the defaulting  
16 party. A recommended, initial, or final order issued against a defaulting party may be based on  
17 the defaulting party's admissions or other evidence that may be used without notice to the  
18 defaulting party. If the burden of proof is on the defaulting party to establish that the party is  
19 entitled to the agency action sought, the presiding officer may issue a recommended, initial, or  
20 final order without taking evidence.

21 (b) Not later than [ ] days after a recommended, initial, or final order is rendered against  
22 a party subject to a default order, that party may petition the presiding officer to vacate the  
23 recommended, initial, or final order. If good cause is shown for the party's failure to appear, the  
24 presiding officer shall vacate the decision and, after proper service of notice, conduct another  
25 evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding  
26 officer shall deny the motion to vacate.

27 **Comment**

28 Under this section the presiding officer has the power to impose a default judgment.

1 However, the default decision must be based upon prima facie evidence. Among the other laws  
2 that modify the presiding officer's discretion are the [state] rules of civil procedure. The section  
3 thus authorizes a presiding officer to issue a default judgment for the same reasons as contained  
4 in the state rules of civil procedure. This section is based on 1981 MAPA Section 4-208.

5  
6 Subsection (b) is based in part on 1981 MSAPA Section 4-208 and on California  
7 Government Code Section 11520.

8  
9 **SECTION 413. ORDERS: FINAL, RECOMMENDED, INITIAL.**

10 (a) If the presiding officer is the agency head, the presiding officer shall render a final  
11 order.

12 (b) Except as otherwise provided by law other than this [act], if the presiding officer is  
13 not the agency head and has not been delegated final decisional authority, the presiding officer  
14 shall render a recommended order. If the presiding officer is not the agency head and has been  
15 delegated final decisional authority, the presiding officer shall render an initial order that  
16 becomes a final order [30] days after issuance, unless reviewed by the agency head on its own  
17 motion or on petition of a party.

18 (c) A recommended, initial, or final order must be served in a record upon each party and  
19 the agency head within 90 days after the hearing ends, the record closes, or memos, briefs, or  
20 proposed findings are submitted, whichever is later. The time may be extended by stipulation,  
21 waiver, or upon a showing of good cause.

22 (d) A recommended, initial, or final order must include separately stated findings of fact  
23 and conclusions of law on all material issues of fact, law, or discretion, the remedy prescribed,  
24 and, if applicable, the action taken on a petition for stay. A party may submit proposed findings  
25 of fact and conclusions of law. The order must also include a statement of the available  
26 procedures and time limits for seeking reconsideration or other administrative relief, and a  
27 statement of the time limits for seeking judicial review of the agency order. A recommended or

1 initial order must include a statement of any circumstances under which the order, without  
2 further notice, may become a final order.

3 (e) Findings of fact must be based exclusively on the evidence in the hearing record in  
4 the contested case and on matters officially noticed.

5 (f) An order is issued under this Section when it is signed by the agency head, presiding  
6 officer, or an individual authorized by law other than this [act] to sign the order.

### 7 **Comment**

8 See Section 102(11) for the definition of “final order” Section 102(14 for the definition of  
9 initial order, and section 102 (24) of this act for the definition of “recommended order”. This  
10 section draws upon useful provisions from several states. E.g. see: Alabama, Ala.Code 1975  
11 Section 41-22-16; Iowa, I.C.A. Section 17A.15; Kansas, K.S.A. Section 77-526; Michigan,  
12 M.C.L.A. 24.281; Montana, MCA 2-4-623; Washington, RCWA 34.05.461. This section is also  
13 based upon 1981 MSAPA Section 4-215. Emergency orders are issued under the provisions of  
14 Section 408, not this section.

15  
16 The third sentence of subsection (d) is taken from the 1961 MSAPA.  
17

### 18 **SECTION 414. AGENCY REVIEW OF INITIAL ORDER.**

19 (a) An agency head may review an initial order on its own motion.

20 (b) A party may petition an agency head to review an initial order. Upon petition by a  
21 party, the agency head may review an initial order, except as otherwise provided by law other  
22 than this [act].

23 (c) A petition for review of an initial order must be filed with the agency head, or with  
24 any person designated for this purpose by agency rule not later than [10] days after the initial  
25 order is issued, or the parties are notified of the order, whichever is later. If the agency head  
26 decides to review an initial order on its own motion, the agency head shall give notice in a record  
27 of its intention to review the order within [10] days after it is issued, or the parties are notified of  
28 the order, whichever is later.

1 (d) The [10]-day period in subsection (c) for a party to file a petition or for the agency  
2 head to notify the parties of its intention to review an initial order, is tolled by the submission of  
3 a timely petition under Section 416 for reconsideration of the order. A new [10]-day period  
4 begins upon disposition of the petition for reconsideration. If an order is subject both to a timely  
5 petition for reconsideration and to a petition for review by the agency head, the petition for  
6 reconsideration must be disposed of first, unless the agency head determines that action on the  
7 petition for reconsideration has been unreasonably delayed.

8 **SECTION 415. AGENCY REVIEW OF RECOMMENDED ORDER.**

9 (a) An agency head shall review a recommended order pursuant to this section.

10 (b) When reviewing a recommended order, the agency head shall exercise all the  
11 decision-making power that the agency head would have had if the agency head had conducted  
12 the hearing that produced the order, except to the extent that the issues subject to review are  
13 limited by a provision of law other than this [act] or by order of the agency head upon notice to  
14 all the parties. In reviewing findings of fact in a recommended order by the presiding officer, the  
15 agency head shall consider the presiding officer's opportunity to observe the witnesses and to  
16 determine the credibility of witnesses. The agency head shall consider the hearing record or  
17 parts that are designated by the parties.

18 (c) An agency head may render a final order disposing of the proceeding or may remand  
19 the matter for further proceedings with instructions to the presiding officer who rendered the  
20 recommended order. Upon remanding a matter, the agency head may order such temporary  
21 relief as is authorized and appropriate.

22 (d) A final order or an order remanding the matter for further proceedings must identify  
23 any difference between the order and the recommended order and must state the facts of record

1 that support any difference in findings of fact, the source of law that supports any difference in  
2 legal conclusions, and the policy reasons that support any difference in the exercise of discretion.  
3 A final order under this section must include, or incorporate by express reference to the  
4 recommended order, all the matters required by Section 413(d). The agency head shall deliver  
5 the order to the presiding officer and all parties.

#### 6 **Comment**

7  
8 This section draws upon 1981 MSAPA, which reflects current practice in regard to  
9 recommended orders, initial orders, final orders and review of final orders more accurately than  
10 the 1961 MSAPA. Subsections (b) and (e) draw upon the Washington APA, West's RCWA  
11 34.05.464, and the Kansas APA, K.S.A. § 77-527. The object of subsection (e) is to assure  
12 agency head consideration of the issues tendered in the case.  
13

#### 14 **SECTION 416. RECONSIDERATION.**

15 (a) Any party, not later than [ ] days after notice of a final order is given, may file a  
16 petition for reconsideration that states the specific grounds upon which relief is requested. The  
17 place of filing and other procedures, if any, must be specified by agency rule and must be stated  
18 in the final order.

19 (b) If a petition for reconsideration is timely filed, and if the petitioner has complied with  
20 an agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial  
21 review does not begin until the agency disposes of the petition for reconsideration as provided in  
22 Section 503(d).

23 (c) If a petition is filed under subsection (a), the presiding officer shall issue a written  
24 order not later than [20] days after the filing denying the petition, granting the petition and  
25 dissolving or modifying the final order, or granting the petition and setting the matter for further  
26 proceedings. The petition may be granted only if the presiding officer states findings of facts,  
27 conclusions of law, and the reasons for granting the petition.



1 **Comment**

2 This section is based in part on the Washington APA, West's RCWA 34.05.470. This  
3 section creates a general right to seek reconsideration of a recommended or final order.  
4 Subsection (b) must be read concurrently with Section 507(d), which excuses exhaustion to the  
5 extent that a provision of this [act] provides for excuse. See also 1981 MSAPA Section 4-218.  
6

7 **SECTION 417. STAY.** Except as otherwise provided by law other than this [act], a  
8 party, not later than [seven] days after the parties are notified of the order, may request the  
9 agency to stay a final order pending judicial review. The agency may grant the request for a stay  
10 pending judicial review if an agency finds that justice so requires. The agency may grant or deny  
11 the request for stay of the order before, on, or after the effective date of the order.

12 **Comment**

13 The 1961 MSAPA § 15 contained a provision for a stay. Stays are sometimes necessary  
14 to preserve the status quo pending agency review or judicial review. This section is based in part  
15 of 1981 MSAPA Section 4-217. The second sentence of this section is based on Section 705 of  
16 the federal administrative procedure act.  
17

18 **SECTION 418. AVAILABILITY OF ORDERS; INDEX.**

19 (a) Except as otherwise provided in subsections (b) and (c), an agency shall create an  
20 index of all final orders in contested cases and make the index and all final orders available for  
21 public inspection and copying, at cost, in its principal offices.

22 (b) Final orders or decisions that are exempt, privileged, or otherwise made confidential  
23 or protected from disclosure by [the public records law of this state] are not public records and  
24 may not be indexed.

25 (c) A final order may be excluded from an index and disclosure only by order of the  
26 presiding officer with a written statement of reasons attached to the order. If the presiding  
27 officer determines it is possible to redact a final order that is exempt, privileged, or otherwise  
28 made confidential or protected from disclosure by [the public records law of this state] so that it

1 complies with the requirements of that law, the redacted order may be placed in the index and  
2 published.

3 (d) An agency may not rely on a final order adverse to a party other than the agency as  
4 precedent in future adjudications unless the agency designates the order as a precedent, and the  
5 order has been published, placed in an index, and made available for public inspection.

### 6 **Comment**

7  
8 This section is entirely new. This section continues the concept, seen earlier in  
9 connection with rules, of preventing earlier decisional law known only to agency personnel from  
10 constituting the basis for decision in a disputed case. Subsection (c) is based in part on the  
11 provisions of California Government Code Section 11425.60. If the agency wishes to use a case  
12 as precedent in the future, it must make the order and decision in that case available to the public.  
13 The only situations in which an agency may rely on a contested case as precedent without  
14 indexing and making that decision and order available to the public are described in subsection  
15 (b) of this section.

16  
17 In some states there have been attacks on agency adjudications on the basis that the  
18 proceeding should be conducted under the provisions for rulemaking. In the case of *SEC v.*  
19 *Chenery Corp.*, 332 U.S. 194 (1947) the United States Supreme Court held that the choice of  
20 whether to proceed by rulemaking or adjudication is left entirely to the discretion of the agency,  
21 because not every principle can be immediately promulgated in the form of a rule. In the words  
22 of the Supreme Court “Some principles must await their own development, while others must be  
23 adjusted to meet particular, unforeseeable situations.” Most states follow *Chenery*. See  
24 *Illuminating a Bureaucratic Shadow World: Precedent Decisions under California’s Revised*  
25 *Administrative Procedure Act*, 21 J. Nat’l A. Admin. L. Judges 247 (2001) at n. 68.

26  
27 This section makes clear that the choice between rulemaking and adjudication is entirely  
28 in the discretion of the agency. However, in order to prevent law to which the public does not  
29 have access from constituting the basis for decision, final orders must be indexed and available  
30 to the public. See also the California administrative procedure act at West’s Ann. Cal. Gov.  
31 Code, § 11425.60

32  
33 Most states have public records act that require disclosure of government documents and  
34 records to the public unless particular documents are exempt from disclosure under that act.  
35 Subsection (b) refers to those acts, and to exempt decisions under those acts.

1 [ARTICLE] 4A

2 ADJUDICATION OTHER THAN CONTESTED CASE; LICENSING

3 SECTION 401A. ADJUDICATION OTHER THAN CONTESTED CASE.

4 (a) This [article] applies to an adjudication in which an opportunity for an evidentiary  
5 hearing is not required.

6 (b) In an adjudication under this [article], the agency shall give prompt notice of, and a  
7 statement of the reasons for, its action, to any party to the adjudication and shall give the party  
8 the opportunity to respond (orally or in writing) before an impartial decision maker.

9 Comment

10  
11 This section draws on the informal adjudication provisions of several state  
12 Administrative Procedure Acts. See: California Administrative Procedure Act, West's  
13 Ann.Cal.Gov.Code SECTION 11445.40; Va. Administrative Procedure Act, Section 2.2-4019,  
14 Va. Code Ann. § 2.2-4019; and Washington Administrative Procedure Act, Section 34.05.485,  
15 West's RCWA § 34.05.485. The informal hearing may be in the nature of a conference at the  
16 discretion of the presiding officer. The due process requirements for informal adjudication are  
17 detailed in Goss v. Lopez, (1975) 419 U.S. 565, 581-582 (informal due process hearing for  
18 school suspension of ten days or less), and Cleveland Board of Education v. Loudermill (1985)  
19 472 U.S. 532. The four due process elements for an informal adjudication are 1) notice; 2)  
20 statement of reasons; 3) opportunity to respond (orally or in writing); and 4) impartial decision  
21 maker. See Paul Verkuil,

22  
23 SECTION 402A. LICENSING.

24 (a) For purposes of this article, a license applicant does not have the right to notice and an  
25 opportunity to be heard to challenge an agency license application decision. When an agency  
26 decides a license application, the agency shall give prompt notice of its action in response to an  
27 application. If the agency denies the application for a license without the opportunity for an  
28 evidentiary hearing, the agency shall include the reasons for the denial.

29 (b) If a licensee has made timely and sufficient application for the renewal of a license,  
30 the existing license does not expire until the application has been finally acted upon by the

1 agency and, if the application is denied or the terms of the new license are limited, the last day  
2 for seeking judicial review of the agency decision is 45 days after the date of the agency decision  
3 denying the application or limiting the terms of the new license or a later date fixed by order of  
4 the reviewing court.

#### 5 **Comment**

6 Many licensing decisions by administrative agencies can be challenged by the license  
7 holder who has the right to notice and an opportunity to be heard. Challenges to those decisions  
8 would be considered contested cases governed by the provisions of Article 4. If the license  
9 applicant does not have the right to notice and an opportunity to be heard to challenge an agency  
10 licensing decision, then the provisions of Article 4A apply to that licensing decision. Subsection  
11 (b) was taken from the 1961 Model State Administrative Procedure Act, section 14(b), which has  
12 been adopted by many states. See, for example: Alabama, Ala.Code 1975 Section 41-22-19;  
13 Tennessee, T. C. A. Section 4-5-320; Michigan, M.C.L.A. 24.291; and Wisconsin, W.S.A.  
14 227.51.  
15

1 **[ARTICLE] 5**

2 **JUDICIAL REVIEW**

3 **SECTION 501. RIGHT TO JUDICIAL REVIEW; FINAL AGENCY ACTION**  
4 **REVIEWABLE.**

5 (a) As used in this [article], agency action is final when it imposes an obligation, grants  
6 or denies a right, confers a benefit, or determines a legal relationship as a result of an  
7 administrative process. Agency action that is a failure to act is not judicially reviewable except  
8 that a reviewing court shall compel agency action that is unlawfully withheld or unreasonably  
9 delayed. Final agency action includes a final order in a contested case and a final rule.

10 (b) Except as otherwise provided in subsection (d), a person who meets the other  
11 requirements of this [article] is entitled to judicial review of a final agency action.

12 (c) A person that may be entitled to judicial review of a final agency action under  
13 subsection (b) is entitled to judicial review of an agency action that is not final if postponement  
14 of judicial review would result in an inadequate remedy or irreparable harm that outweighs the  
15 public benefit derived from postponement.

16 (d) Final agency action is reviewable except to the extent that:

17 (1) a statute [of this state] other than this [act] precludes judicial review; or

18 (2) agency action is committed to agency discretion by law.

19 **Comment**

20 Subsection (a) of this section provides a right of judicial review of final agency action by  
21 appropriate parties. Under this section, the person seeking review must meet all of the  
22 requirements of this article, which include standing, exhaustion of remedies, and time for filing.  
23 The definition of “agency action” is found in Section 102. This section is similar to the judicial  
24 review provisions of Florida (West’s F.S.A. Section 120.68), Iowa (I.C.A. Section 17A.19),  
25 Virginia (Va. Code Ann. Section 2.2-4026) and Wyoming (W.S.1977 Section 16-3-114). Agency  
26 failure to act is not judicially reviewable unless agency action is unlawfully withheld or  
27 unreasonably delayed. This provisions is based on the federal A.P.A., 5 U.S.C. Section 706(1).

1  
2 Subsection (a) also defines final agency action. The definition used here is found in state  
3 and federal cases. See State Bd. Of Tax Comm’rs v. Ispat Inland, 784 N.E.2D 477 (Ind., 2003);  
4 District Intown Properties v. D.C. Dept. Consumer and Regulatory Affairs, 680 A.2d 1373 (Ct.  
5 Apps. D.C. 1996); Texas Utilities Co. v. Public Citizen, Inc, 897 S.W.2d 443 (Tex. App. 1995);  
6 Bennet v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997); Mobil Exploration and Producing Inc. v.  
7 Dept. Interior, 180 F.3d 1192, 1197 (10<sup>th</sup> Cir. 1999).

8  
9 Subsection (c) creates a limited right to review of non-final agency action.

10  
11 Subsection (d) is based on Section 701(a)(1), (2) of the federal administrative procedure  
12 act.

13  
14 **SECTION 502. RELATION TO OTHER JUDICIAL REVIEW LAW AND**  
15 **RULES.**

16 (a) Unless otherwise provided by law other than this [act], judicial review of final agency  
17 action may only be taken as provided by rules of [appellate] [civil] procedure [of this state]. The  
18 court may grant any type of legal and equitable remedies that are appropriate.

19 (b) Except when judicial review is available under this [article] or under law other than  
20 this [act], final agency action is subject to judicial review in civil or criminal proceedings for  
21 judicial enforcement.

22 **Comment**

23  
24 This section places appeals from final agency action within the existing state rules of  
25 appellate procedure. Such action may be preferred by some states because of constitutional  
26 provisions or because of the existence of rules of appellate procedure that the legislature may not  
27 wish to change. This practice was followed under the 1961 MSAPA, and is followed in a  
28 number of states today. See e.g.: Alaska (AS 44.62.560), California (West’s Ann.Cal.Gov.Code  
29 Section 11523), Delaware (29 Del.C. Section 10143), Florida (West’s F.S.A. Section 120.68),  
30 Iowa (I.C.A. § 17A.20), Michigan (M.C.L.A. 24.302), Minnesota (M.S.A. § 14.63) (Appeal  
31 integrated with state appellate rules), Virginia (Va. Code Ann. Section 2.2-4026), Wyoming  
32 (W.S.1977 § 16-3-114).

33  
34 Subsection (b) is based on Section 703 of the federal administrative procedure act. See  
35 also 1981 MSAPA Sections 5-201 to 5-205.  
36  
37



1 stay from the agency.

## 2 **Comment**

3 This provision for stay permits a party appealing agency final action to seek a stay of the  
4 agency decision in the court. This is similar to the 1961 MSAPA. See also 1981 MSAPA  
5 Section 5-111.

## 6 7 **SECTION 505. STANDING.**

8 (a) For purposes of this section, a person is aggrieved if the agency action has caused, or  
9 is expected to cause, injury to that person [distinct from any injury caused to the public  
10 generally] [if the asserted interests of the person are not inconsistent with or completely  
11 unrelated to those the agency is required to consider when it makes the decision].

12 (b) The following persons have standing to obtain judicial review of a final agency  
13 action:

14 (1) a person that has standing under law of this state other than this [act]; and

15 (2) a person aggrieved or adversely affected by the agency action.  
16

## 17 **Comment**

18  
19 Subsection (b)(1) confers standing that arises under any other provision of law.  
20

21 Examples of this type of standing are statutes that expressly confer standing in general  
22 language such as, for example, “any person may commence a civil suit in his own behalf... to  
23 enjoin... an agency... alleged to be in violation of this chapter. . . .” 16 U.S.C.A. § 1540,  
24 explained in *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154(1997). Another example is standing  
25 recognized in judicial decision or common law.  
26

27 Subsection (b) (2) uses the term person “aggrieved or adversely affected”. This term is  
28 based in part on the provisions of the federal A.P.A., 5 U.S.C. Section 702. These words have  
29 become terms of art used to describe types of injury that were not recognized at common law.  
30 An example of a person entitled to standing who is intended to be included under subsection (2)  
31 is a competitor. These terms have also been used to recognize standing based on non-economic  
32 values, such as aesthetic or environmental injuries.  
33

34 Subsection (a) uses a definition for the term aggrieved that is taken from Section 101 of  
35 the ABA Model Statute for Local Land Use Processes, adopted by the ABA in August, 2008.  
36



## SECTION 506. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

(a) Subject to subsection (e) or a statute of this state other than this [act] which provides that a person need not exhaust administrative remedies, a person may file a petition for judicial review under this [act] only after exhausting all administrative remedies available within the agency the action of which is being challenged and within any other agency authorized to exercise administrative review.

(b) Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for seeking judicial review.

(c) A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding upon which the rule is based.

(d) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent the administrative remedies are inadequate or would result in irreparable harm.

### Comment

This section creates a default requirement of exhaustion, which is generally followed in the states. However, the section creates several exceptions to the default rule. Subsection (b) requires issue exhaustion in appeals from rulemaking for persons who did not participate in the challenged rulemaking. It excuses persons seeking judicial review of a rule who were not parties before the agency from the exhaustion requirement; but, if the issue that they seek to raise was not raised and considered in the rulemaking proceeding that they challenge, then they must first petition the agency to conduct another rulemaking to consider the issue. If the agency refuses to do so or if the agency conducts a second rulemaking that is adverse to the petitioner on the issue or issues raised in his petition for rulemaking, then the petitioner may seek judicial review. Subsection (d) recognizes the judicially created exception to the exhaustion requirement where agency relief would be inadequate or would result in irreparable harm. In some states courts have held that irreparable harm that is a sufficient condition to excuse exhaustion exists only if it outweighs the public interest in exhaustion. State courts are free under this section to engage in that weighing test.

**SECTION 507. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTION.**

Judicial review of adjudication and rulemaking is confined to the agency record or matters

1 arising from the record except insofar as the petitioner alleges procedural error arising from  
2 matters outside the agency record or alleges matters that are not evident from the record that  
3 involve new evidence or changed circumstances. The record may be opened only to avoid  
4 manifest injustice.

#### 5 **Comment**

6  
7 This section establishes a default closed record for judicial review of adjudication and  
8 rulemaking. It is well established in most states and in federal administrative procedure that, in  
9 case of adjudication, judicial review is based upon that evidence which was before the agency on  
10 the record. Otherwise, the standards of judicial review could be subverted by the introduction of  
11 additional evidence to the court that was not before the agency. See *Western States Petroleum*  
12 *Ass'n v. Superior Court*, 888 P.2d 1268 (Cal. 1995). For rulemaking, the record for judicial  
13 review is defined in Section 302 of this Act.

14  
15 The section contains an exception to the closed record on review where petitioner alleges  
16 error, such as ex parte contacts, that does not appear in or is not evident from the record. Other  
17 examples of error that do not appear or are not evident from the record are: improper constitution  
18 of the decision making body, grounds for disqualification of a decision maker, or unlawful  
19 procedure. However, the standard for opening the record on appeal is high.

#### 20 21 **SECTION 508. SCOPE OF REVIEW.**

22 (a) In judicial review of an agency action, the following rules apply:

23 (1) Except as provided by law other than this [act], the burden of demonstrating  
24 the invalidity of agency action is on the party asserting invalidity.

25 (2) The court shall make a separate and distinct ruling on each material issue on  
26 which the court's decision is based.

27 (3) The court may grant relief only if it determines that a person seeking judicial  
28 review has been prejudiced by one or more of the following:

29 (A) the agency erroneously interpreted the law of this or another state;

30 (B) the agency committed an error of procedure;

31 (C) the agency action is arbitrary, capricious, an abuse of discretion, or

1 otherwise not in accordance with law;

2 (D) an agency determination of fact is not supported by substantial  
3 evidence in the record as a whole; or

4 (E) to the extent that the facts are subject to trial de novo by the reviewing  
5 court, the action was unwarranted by the facts.

6 (b) In making determinations under this section, the court shall review the whole agency  
7 record, or the parts designated by the parties and shall take due account of the rule of harmless  
8 error.

### 9 **Comment**

10  
11 One view is that scope of review is notoriously difficult to capture in verbal formulas,  
12 and its application varies depending on context. For that reason, some members urge return to  
13 shorter, skeletal formulations of the scope of review, similar to the 1961 MSAPA. See Ronald  
14 M. Levin, Scope of Review Legislation, 31 Wake Forest L. Rev. 647 (1996) at 664-66. William  
15 D. Araiza, In Praise of a Skeletal APA, 56 Admin. L. Rev. 979 (2004). (Judiciary, not  
16 legislature, appropriate body to evolve specific standards for review, because of great variety of  
17 agency action and contexts, and inability to describe how general standards of review should  
18 apply to many of them). Alternative 1 reflects this view.

19  
20 The other view is that judicial review is sometimes almost perfunctory, and more detailed  
21 standards will result in closer judicial scrutiny. A related view strongly argued in drafting  
22 committee meetings was that scope of review is a device by which the judiciary assists the  
23 legislature to keep the agencies within the bounds set by the legislature, helps to assure agency  
24 action consistent with the intent of the legislature, and protects citizens from agency error. More  
25 detailed scope of review provisions also make the task of the judiciary easier because they  
26 provide clearer instructions from the legislature about how to review agency decisions. More  
27 detailed scope of review provisions lead to more intense judicial review, and that is an approach  
28 that legislatures welcome for the same reason that they have embraced regulatory review: it  
29 controls agency action. Alternative 2, which draws heavily on the Iowa provisions on scope of  
30 review ( I.C.A. 17. A.19(10)), represents this position.

31  
32 Judicial review is essential and exists in all states. Subsections (a) (1) & (2) describe the  
33 general burdens on the appellant and the approach under this Act. They are substantially similar  
34 to the general scope of review provisions of the Federal APA, 5 U.S.C. Section 706.

35  
36 Subsections (a)[(3) alternative 1](A) & (B) identify the courts' power to decide questions  
37 of law and procedure. Subsection (a)[(3) alternative 1](A) includes, but is not limited to,  
38 violations of constitutional or statutory provisions and actions that are in excess of statutory

1 authority from Section 15(g) of the 1961 MSAPA, and includes subsections (c) (1), (2) and (4) of  
2 the 1981 MSAPA. The section thus includes challenges to the facial or applied constitutionality  
3 of a statute, challenges to the jurisdiction of the agency, erroneous interpretation of the law, and  
4 may include erroneous application of the law. This section is not intended to preclude courts  
5 from according deference to agency interpretations of law, where such deference is appropriate.  
6

1 [ARTICLE] 6

2 OFFICE OF ADMININISTRATIVE HEARINGS

3 SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS.

4  
5 (a) In this [article], office means the [Office of Administrative Hearings].

6  
7 (b) The [Office of Administrative Hearings] is created in the executive branch of state  
8 government [within the [ ] agency].

9 Comment

10 Section 601 is based upon Section 1-2(a) of the Model Act Creating a State Central  
11 Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the  
12 American Bar Association (February 2, 1997). Thirty states (including the District of Columbia)  
13 have established central panel agencies. Representative state statutes creating a central panel  
14 include Alaska statutes, section 44.64.010, California Government Code Section 11370.2,  
15 Louisiana: statutes, Section 49.991, and Washington Administrative Procedure Act, Section  
16 34.12.010.

17  
18 SECTION 602. CHIEF ADMINISTRATIVE LAW JUDGE; APPOINTMENT;  
19 QUALIFICATIONS; TERM; REMOVAL.

20 (a) The office is headed by a chief administrative law judge appointed by [the Governor]  
21 [with the advice and consent of the Senate].

22 (b) A chief administrative law judge serves a term of [five] years, and until a successor is  
23 appointed and qualifies for office, in entitled to the salary provided by law, and may be  
24 reappointed.

25 (c) At the time of appointment, the chief administrative law judge must have been  
26 admitted to the practice of law in this state for at least five years and have substantial experience  
27 in administrative law.

28 (d) A chief administrative law judge:

29 (1) must take the oath of office required by law before beginning the duties of the

1 office;

2 (2) shall devote full time to the duties of the office and may not engage in the  
3 private practice of law; and

4 (3) is subject to the code of conduct for administrative law judges adopted  
5 pursuant to Section 604(7).

6 (e) A chief administrative law judge may be removed from office only for cause and  
7 only after notice and an opportunity for a contested case hearing.

8 **Comment**  
9

10 Section 602 is based upon Section 1-4 of the Model Act Creating a State Central Hearing  
11 Agency (Office of Administrative Hearings) adopted by the house of delegates of the American  
12 Bar Association (February 2, 1997).  
13

14 **SECTION 603. ADMININSTRATIVE LAW JUDGES; APPOINTMENT;**  
15 **QUALIFICATIONS, DISCIPLINE.**

16 (a) The chief administrative law judge shall appoint administrative law judges pursuant  
17 to the [state merit system].

18 (b) In addition to meeting other requirements of the [state merit system], to be eligible  
19 for appointment as an administrative law judge, an individual must have been admitted to the  
20 practice of law in this state for at least [three] years.

21 (c) An administrative law judge:

22 (1) shall take the oath of office required by law before beginning duties as an  
23 administrative law judge;

24 (2) is subject to the code of conduct for administrative law judges adopted  
25 pursuant to Section 604(7);

26 (3) is entitled to the compensation provided by law; and

(4) may not perform any act inconsistent with the duties and responsibilities of an administrative law judge.

(d) An administrative law judge:

(1) is subject to the supervision of the chief administrative law judge;

(2) may be disciplined pursuant to the [state merit system law];

(3) Except as otherwise provided in paragraph (4), may be removed from office only for cause and only after notice and an opportunity for a contested case hearing; and

(4) is subject to a reduction in force in accordance with the [state merit system law].

(e) On the [effective date of this [act]], administrative law judges employed by agencies to which this [article] applies are transferred to the office and, regardless of the minimum qualifications imposed by this [article], are administrative law judges in the office.

### **Comment**

Section 603 is based upon Sections 1-2(b), and 1-6 of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

### **SECTION 604. CHIEF ADMINISTRATIVE LAW JUDGE; POWERS; DUTIES.**

The chief administrative law judge has the powers and duties specified in this section. The chief administrative law judge:

(1) shall supervise and manage the office;

(2) shall assign randomly administrative law judges in any case referred to the office, taking into account administrative law judge expertise;

(3) shall assure the decisional independence of each administrative law judge;

(4) shall establish and implement standards for equipment, supplies, and technology for

1 administrative law judges;

2 (5) shall provide and coordinate continuing education programs and services for  
3 administrative law judges and advise them of changes in the law concerning their duties;

4 (6) shall adopt rules pursuant to this [act] to implement this [article];

5 (7) shall adopt a code of conduct for administrative law judges;

6 (8) shall monitor the quality of adjudications conducted by administrative law judges;

7 (9) shall discipline administrative law judges who do not meet appropriate standards of  
8 conduct and competence;

9 (10) may accept grants and gifts for the benefit of the office; and

10 (11) may contract with other public agencies for the services of the office.

#### 11 12 **Comment**

13 Section 604 is based upon Section 1-5 of the Model Act Creating a State Central Hearing  
14 Agency (Office of Administrative Hearings) adopted by the house of delegates of the American  
15 Bar Association (February 2, 1997).

#### 16 17 **SECTION 605. COOPERATION OF AGENCIES.**

18 (a) All agencies shall cooperate with the chief administrative law judge in the discharge  
19 of the duties of the office.

20 (b) Subject to Section 402(g), an agency may not reject a particular administrative law  
21 judge for a particular hearing.

#### 22 **Comment**

23 Section 605 is based upon Section 1-7(a) of the Model Act Creating a State Central  
24 Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the  
25 American Bar Association (February 2, 1997). There are similar provisions in Alaska statutes,  
26 section 44.64.080. Agencies should cooperate with the office of administrative hearings by  
27 providing information and coordinating schedules for contested case hearings.  
28  
29



**SECTION 606. ADMINISTRATIVE LAW JUDGES; POWERS; DUTIES;  
DECISION MAKING AUTHORITY.**

(a) [Except as otherwise provided in subsection (d), unless] [Unless] the agency head elects to conduct the hearing, in which case the agency head shall render a final order under Section 413(a), in a contested case, an administrative law judge shall be assigned to be the presiding officer. The administrative law judge shall issue a recommended or initial order to the agency head in the contested case pursuant to Section 413.

(b) Except as provided by law other than this [act], if a matter is referred to the office by an agency, the agency may not take further action with respect to the proceeding, except as a party, until a recommended or initial order is issued. [This subsection does not prevent an appropriate interlocutory review by the agency or an appropriate termination or modification of the proceeding by the agency when authorized by law other than this [act].]

(c) In addition to acting as the presiding officer in contested cases under this [act], subject to the direction of the chief administrative law judge, an administrative law judge may perform such other duties as are authorized by law other than this [act].

[(d) This section does not apply to the following agencies: [list agencies exempted]].

### Comment

Section 606 is based upon Section 1-10 of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

1 [ARTICLE] 7

2 RULES REVIEW

3 SECTION 701. [LEGISLATIVE RULES REVIEW COMMITTEE]. There is

4 created a standing committee of the Legislature designated the [rules review committee].

5 *Legislative Note:* States that have existing rules review committees can incorporate the  
6 provisions of Sections 701, and 702, using the existing number of members of their current rules  
7 review committee. Because state practice varies as to how these committees are structured, and  
8 how many members of the legislative body serve on this committee, as well as how they are  
9 selected, the act does not specify the details of the legislative review committee selection process.  
10 Details of the committee staff and adoption of rules to govern the rules review committee staff  
11 and organization are governed by law other than this act including the existing law in each state.  
12

13 SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE].

14 (a) An agency shall file a copy of an adopted, amended, or repealed rule with the [rules  
15 review committee] at the same time it is filed with [the [publisher]]. An agency is not required to  
16 file an emergency rule adopted under Section 309(a) with the [rules review committee].

17 (b) The [rules review committee] may examine rules in effect and newly adopted,  
18 amended, or repealed rules to determine whether the:

- 19 (1) rule is a valid exercise of delegated legislative authority;
- 20 (2) statutory authority for the rule has expired or been repealed;
- 21 (3) rule is necessary to accomplish the apparent or expressed intent of the specific  
22 statute that the rule implements;
- 23 (4) rule is a reasonable implementation of the law as it applies to any affected  
24 class of persons; and
- 25 (5) agency complied with the regulatory analysis requirements of Section 305  
26 and the analysis properly reflects the effect of the rule.
- 27 (c) The [rules review committee] may request from an agency information necessary to

1 exercise its powers under subsection (b). The [rules review committee] shall consult with  
2 standing committees of the Legislature with subject matter jurisdiction over the subjects of the  
3 rule under examination.

4 (d) The [rules review committee]:

5 (1) shall maintain oversight over agency rulemaking; and

6 (2) shall exercise other duties assigned to it under this [article].

7 **Comment**

8 This section adopts a rules review committee process that is widely followed in state  
9 administrative law as a method for legislative review of agency rules. Subsection (b) allows the  
10 legislative rules review committee to review currently effective rules and newly adopted rules.  
11 The rules review committee may establish priorities for rules review including review of newly  
12 adopted or amended rules, and may manage the rules review process consistent with committee  
13 staff and budgetary resources. If the content of the rule changes because of legislative  
14 amendments, the agency will be required to file the amended rule with the publisher, and the  
15 amended rule will replace the original rule that was filed with the publisher. The rules review  
16 process applies to rules adopted following the requirements of Sections 304 to 308. This process  
17 does not apply to emergency rules adopted under Section 309(a).

18  
19 **SECTION 703. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.**

20 (a) Not later than [30] days after receiving a copy of an adopted, amended, or repealed  
21 rule from an agency under Section 702, the [rules review committee] may:

22 (1) approve the adopted, amended, or repealed rule;

23 (2) disapprove the rule and propose an amendment to the adopted, amended, or  
24 repealed rule; or

25 (3) disapprove the adopted, amended, or repealed rule.

26 (b) If the [rules review committee] approves an adopted, amended, or repealed rule or  
27 does not disapprove and propose an amendment under subsection (a)(2) or disapprove under  
28 subsection (a)(3), the adopted, amended, or repealed rule becomes effective on the date specified  
29 for the rule in Section 316.

1 (c) If the [rules review committee] proposes an amendment to the adopted or amended  
2 rule under subsection (a)(2), the agency may make the amendment and resubmit the rule, as  
3 amended, to the [rules review committee]. The amended rule must be one that the agency could  
4 have adopted on the basis of the record in the rulemaking proceeding and the legal authority  
5 granted to the agency. The agency shall provide an explanation for the amended rule as provided  
6 in Section 312. An agency is not required to hold a hearing on an amendment made under this  
7 subsection. If the agency makes the amendment, it shall also give notice to the [publisher] for  
8 publication of the rule, as amended, in the [administrative bulletin]. The notice must include the  
9 text of the rule as amended. If the [rules review committee] does not disapprove the rule, as  
10 amended, or propose a further amendment, the rule becomes effective on the date specified for  
11 the rule under Section 316.

12 (d) If the [rules review committee] disapproves the adoption, amendment, or repeal of a  
13 rule under subsection (a)(3), the adopted, amended, or repealed rule becomes effective upon  
14 adjournment of the next regular session of the legislature unless before the adjournment the  
15 legislature [adopts a [joint] [ concurrent] resolution] [enacts a bill] sustaining the action of the  
16 committee. The [rules review committee] disapproval power expires at the adjournment o the  
17 session or after the legislature has been in session for a total of 90 days, whichever comes first.

18 (e) An agency may withdraw the adoption, amendment, or repeal of a rule by giving  
19 notice of the withdrawal to the [rules review committee] and to the [publisher] for publication in  
20 the [administrative bulletin]. A withdrawal under this subsection terminates the rulemaking  
21 proceeding with respect to the adoption, amendment, or repeal, but does not prevent the agency  
22 from initiating a new rulemaking proceeding for the same or substantially similar adoption,  
23 amendment, or repeal.

1 **Legislative Note:** *The 30 day time period in subsection (a) is the same as the 30 day time period*  
2 *in section 316(a).*

3  
4 *State constitutions vary as to whether or not a joint resolution is a valid way of*  
5 *disapproving an agency rule. In some states, the legislature must use the bill process with*  
6 *approval by the governor. In other states the joint resolution process is proper. States should use*  
7 *the alternative that complies with their state constitution. State constitutions vary on the federal*  
8 *constitutional issue decided by the U.S. Supreme Court in I.N.S. v. Chadha (1983) 462 U.S. 919,*  
9 *103 S.Ct. 2764. The U.S. Supreme Court held that the one house legislative veto provided for in*  
10 *section 244(c)(2) violated the Article I requirement that legislative action requires passage of a*  
11 *law by both houses of congress (bicameralism) and presentation to the president for signing or*  
12 *veto (presentation requirement). Those state constitutions that require presentation to the*  
13 *governor need an additional step, presentation of the joint resolution to the governor for*  
14 *approval or disapproval. With state constitutions that do not require presentation to the*  
15 *governor the rules review process can be completed with legislative adoption of a joint*  
16 *resolution.*

### 17 18 **Comment**

19  
20 This is a type of veto that provides for cooperation between the Legislature and the  
21 Governor, and attempts to avoid the I.N.S. v. Chadha (1983) 462 U.S. 919, 103 S.Ct. 2764.  
22 problem of unconstitutionality by delaying the effective date of the rule until the legislature has  
23 the opportunity to enact legislation to annul or modify it. The governor may veto the act by  
24 which the legislature seeks to annul or modify the rule. This type of veto provision is widely  
25 used in the states. For disapproval of a rule to be effective, the legislature as a whole must adopt  
26 a joint resolution, and in many states the governor must be presented with the joint resolution for  
27 approval or disapproval. While the rules review committee can recommend disapproval, the  
28 committee recommendation must be approved by the legislature by joint resolution. In some  
29 states, the legislature must comply with the legislative process for enacting a bill including  
30 presentation to the governor to exercise the power of legislative veto over an agency regulation.  
31 In at least one state use of a joint resolution without the governor's participation violates the state  
32 constitution. State v. A.L.I.V.E. Voluntary (Alaska, 1980) 606 P.2d 769. The rules review  
33 committee has the power to temporarily suspend an agency rule pending enactment of a  
34 permanent suspension by action of both houses of the state legislature, and presentation to the  
35 governor. Martinez v. Department of Industry, Labor, & Human Relations (Wisconsin, 1992)  
36 165 W.2d 687, 478 N.W.2d 582 (temporary suspension statute held not to violate state  
37 constitution separation of powers doctrine).  
38

1 [ARTICLE] 8

2 **APPLICABILITY; EFFECTIVE DATE**

3 **SECTION 801. APPLICABILITY.** This [act] governs all agency proceedings, and all  
4 proceedings for judicial review or civil enforcement of agency action, commenced after [the  
5 effective date of this [act]]. This [act] does not govern an adjudication for which notice was given  
6 before that date under Section 403 and rulemaking proceedings for which notice was given or a  
7 petition filed before that date.

8 **Comment**

9  
10 Section 801 is based on Section 1-108 of the 1981 MSAPA. See Also California  
11 Government Code Sections 11400.10, and 11400.20 (operative date of California APA  
12 revisions). Agency proceedings on remand following judicial review after the act takes effect  
13 are governed by the prior law.  
14

15 **SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**  
16 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal  
17 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et. seq.,  
18 but does not modify, limit, or supersede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or  
19 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
20 U.S.C. Section 7003(b).

21 **SECTION 803. REPEALS.** The following acts and parts of acts are repealed:

22 (a) [the 1961 Model State Administrative Procedure Act]

23 (b) [the 1981 Model State Administrative Procedure Act]

24 (c)

25 **SECTION 804. EFFECTIVE DATE.** This [act] takes effect on [date].